TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 220.

M. V. B. PARKER, PLAINTIFF IN ERROR,

vs.

JULIA A. McCLAIN, EXECUTRIX OF THE ESTATE OF CAREY McCLAIN, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF HAWAII.

FILED JULY 23, 1915.

(23,800)

(23,800)

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JULIA A. McCLAIN, EXECUTRIX OF THE ESTATE OF CAREY McCLAIN, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 18, 1914.

1 In the Supreme Court of the State of Kansas.

No. 17930.

JULIA A. McLAIN, Executrix, etc., Appellant,
vs.
M. V. B. PARKER, Appellee.

Be it Remembered that on the 11th. day of November, 1911, there was filed in the office of the clerk of the supreme court of the state of Kansas, certified copies of the notice of appeal and proof of service thereof, and of the journal entry of judgment of the court below, which notice of appeal with proof of service thereof and journal entry of judgment are in the words and figures as follows, to-wit:

2 No. 17930.

Filed Nov. 11, 1911. D. A. Valentine, Clerk Supreme Court.

THE STATE OF KANSAS,
Tenth Judicial District, Johnson County, ss:

I, S. W. Alderson, Clerk of the District Court of the Tenth Judicial District of the State of Kansas, sitting within and for the County aforesaid, do hereby certify the above and foregoing to be a true, full and complete copy of The Motion for a New Trial in the therein entitled cause, as the same remains of record in my office.

Witness My Hand, and the seal of said Court at my office in Olathe, this, the 10 day of November A. D., 1911.

[SEAL.] S. W. ALDERSON,
Clerk of the District Court.

3 Filed Nov. 11, 1911. D. A. Valentine, Clerk Supreme Court.

THE STATE OF KANSAS,
County of ——, ss:

In the District Court, Sitting in and for the County of ——, in the State of Kansas.

No. 6724.

JULIA A. McLAIN, Executrix of the Estate of Carey McLain, Deceased, Plaintiff,
against
M. V. B. PARKER, Defendant.

Now comes the plaintiff and moves the Court for a new trial of the above entitled cause for the following reasons, to wit:

1 Irregularity in the proceedings of the Court, and prevailing party, abuse of discretion by which the plaintiff was prevented from having a fair trial,

2 Misconduct of the prevailing party.

3 Accident and surprise which ordinary prudence could not have guarded against.

4 The verdict report decision is not sustained by sufficient evidence and is contrary to law.

5 Newly discovered evidence material to said plaintiff which could not, with reasonable diligence, have been discovered and produced at the trial.

6 Error of law occurring at the trial and excepted to at the time by said plaintiff.

7 Erroneous ruling of the Court.

8 That the decision is in whole contrary to the evidence.

9 That the Court excluded evidence offered by plaintiff at the trial material to plaintiff.

NOTE.—Affidavits and other evidence will be used on the hearing of said motion.

W. R. THURMOND AND
C. W. GORSUCH,
Attorneys for said Plaintiff.

Endorsed: Motion for New Trial. District Court, —— County, Kansas. McLain, Plaintiff, vs. Parker, Defendant. Filed Oct. 3, 1911. S. W. Alderson, Clerk District Court.

4 THE STATE OF KANSAS,
Tenth Judicial District, Johnson County, ss:

I, S. W. Alderson, Clerk of the District Court of the Tenth Judicial District of the State of Kansas, sitting within and for the County aforesaid, do hereby certify the above and foregoing to be a true, full and complete copy of The Journal Entry on Motion for a New Trial in the therein entitled cause, as the same remains of record in my office.

Witness My Hand, and the seal of said Court at my office in Olathe, this, the 10 day of November A. D., 1911.

[SEAL.]

S. W. ALDERSON,
Clerk of the District Court.

5 UNITED STATES OF AMERICA,
The State of Kansas, Tenth Judicial District, Johnson County, ss:

Pleas and proceedings in the District Court of the Tenth Judicial District, of the State of Kansas, sitting within and for Johnson County, in said State, at the regular term thereof begun and held at the Court House, in the City of Olathe, in said County and State, commencing on the Fourth day of September, A. D. 1911, as by statute required.

Present: The Honorable J. O. Rankin, District Judge of the said Tenth Judicial District of said State; L. L. Cave, Sheriff of said County, and S. E. Alderson, Clerk of said Court within and for said County.

Be it Remembered, That at said Term of said District Court within and for said County of Johnson, among other things, the following proceedings were had and entered of record in the Journal of said Court on the 1st day of November, A. D., 1911.

September Term, Eighteenth day, Nov. 1st, 1911 Court called pursuant to adjournment. Present, the Honorable ——, District Judge, and other officers as before.

No. 6724.

JULIA A. MCLAIN, Executrix of the Estate of Carey McLain,
vs.
M. V. B. PARKER.

Now on this 1st day of November A. D. 1911 this cause came on for the hearing of the Court on the motion of the plaintiff for a new trial.

Plaintiff appeared by W. R. Thurmond her attorney defendant appeared by I. O. Pickering his attorney.

Court heard argument of counsel and being well advised in the premises finds that the said motion of the plaintiff for a new trial should be over-ruled.

It is therefore now by the Court considered ordered and adjudged that the motion of the plaintiff for a new trial be and the same is hereby over-ruled.

6 THE STATE OF KANSAS,
Tenth Judicial District, Johnson County, ss:

I, S. W. Alderson, Clerk of the District Court of the Tenth Judicial District of the State of Kansas, sitting within and for the County aforesaid, do hereby certify the above and foregoing to be a true, full and complete copy of The Notice of Appeal in the therein entitled cause, as the same remains of record in my office.

Witness My Hand, and the seal of said Court at my office in Olathe, this, the 10 day of November A. D., 1911.

[SEAL.] S. W. ALDERSON,
Clerk of the District Court.

7 In the District Court of Johnson County, Kansas.

No. 6724.

JULIA A. MCLAIN, as Executrix of the Estate of Carey McLain, Deceased, Plaintiff,
vs.
M. V. B. PARKER, Defendant.

Notice of Appeal.

To Sam Alderson, Clerk of the District Court of Johnson County, Kansas, and to M. V. B. Parker, Defendant in the Above-entitled Action, and to I. O. Pickering, Attorney of Record for said Defendant:

You, and each of you are hereby notified that the plaintiff Julia A. McLain executrix of the estate of Carey McLain, deceased appeals from the judgment order and decision rendered by the above entitled Court in the above entitled action on the 3rd day of October, 1911, and from the order of said Court rendered in said action denying the plaintiff a new trial thereof, and from each and all other final orders and any and all rulings adverse to plaintiff rendered by said Court in said action against the plaintiff that involve the merits of said action, to the Supreme Court of the State of Kansas, and of this you and each of you will take notice.

JULIA A. McLAIN,
As Executrix of the Estate of
Carey McLain, Deceased,
By W. R. THURMOND,
C. W. GORSUCH,
Her Attorneys.

Service of the above and foregoing notice is acknowledged this 1st day of November, 1911.

I. O. PICKERING,
Attorney for Defendant.

Endorsed on Back.

STATE OF KANSAS,
County of Johnson, ss:

W. R. Thurmond, being duly sworn on his oath states that he delivered a copy of the within and foregoing notice of appeal to I. O. Pickering Esq. attorney of record for the defendant M. V. B. Parker, on this 1st day of November, 1911 — Johnson County, Kansas.

W. R. THURMOND.

Attest:

—— ——.

8 Subscribed and sworn to before me this 1st day of November 1911.

S. W. ALDERSON,
Clerk of the District Court.
B. M. ALDERSON, *Deputy.*

6724. Julia A. McLain Executrix etc. vs. M. V. B. Parker. Notice of Appeal. Filed Nov. 1st, 1911. S. W. Alderson, Clerk Dist. Court.

9 THE STATE OF KANSAS,
Tenth Judicial District, Johnson County, ss:

I, S. W. Alderson, Clerk of the District Court of the Tenth Judicial District of the State of Kansas, sitting within and for the County aforesaid, do hereby certify the above and foregoing to be a true, full and complete copy of The Journal Entry of Judgment in the therein entitled cause, as the same remains of record in my office.

Witness my hand, and the seal of said Court at my office in Olathe, this, the 10th day of November, A. D., 1911.

[SEAL.] S. W. ALDERSON,
Clerk of the District Court.

10 UNITED STATES OF AMERICA,
The State of Kansas, Tenth Judicial District, Johnson County, ss:

Pleas and Proceedings in the District Court of the Tenth Judicial District of the State of Kansas, Sitting Within and for Johnson County, in said State, at the Regular Term Thereof, Begun and Held at the Court House, in the City of Olathe, in said County and State, Commencing on the Fourth Day of September, A. D. 1911, as by Statute Required.

Present, the Honorable J. O. Rankin, District Judge of the said Tenth Judicial District of said State; L. L. Cave, Sheriff of said County, and S. W. Alderson, Clerk of said Court within and for said County.

Be it remembered, That at said Term of said District Court within and for said County of Johnson, among other things, the following proceedings were had and entered of record in the Journal of said Court on the third day of October, A. D., 1911.

September Term, Fifteenth Day, Oct. 3rd, 1911 Court called pursuant to adjournment. Present, the Honorable —— ——, District Judge, and other officers as before.

No. 6724.

JULIA A. MCLAIN, Executrix of the Estate of Carey McLain, Deceased,
vs.
M. V. B. PARKER.

Now at this day it being a regular judicial day of the September 1911 term of said Court, said cause came regularly on for the decision and judgment of the Court. And thereupon came said plaintiff by C. W. Gorsuch her attorney, as well as also came the defendant M. V. B. Parker in his own proper person and by I. O. Pickering his attorney. And thereupon the Court having heard the evidence and the arguments of counsel at a former sitting and being now well advised in the premises, Court finds for the defendant and against said plaintiff Julia A. McLain, as executrix of the estate of Carey McLain, deceased. The Court finds from the evidence in this case that Carey McLain died January 19th, 1907 that in his lifetime and on the 16th day of April 1906, the said Carey McLain obtained a valid judgment, against the said M. V. B. Parker, in the Circuit Court of Jackson County, in the State of Missouri, which said
11 judgment has become final. That the said Carey McLain commenced this action in this Court on said judgment against the defendant on May 5th 1906. The Court finds that after the death of Carey McLain, the plaintiff Julia A. McLain was duly appointed and qualified as executrix of his estate in Kansas by the Probate Court of Franklin County, Kansas, and on the 6th day of May, 1907 said action was revived in the name of Julia A. McLain as executrix of the estate of said Carey McLain, deceased. That by reason of a pending appeal of said case in the Circuit — of Jackson County, Missouri, said action in this Court was stayed until the decision of said cause in the Supreme Court of the State of Missouri. That on January 4th 1911, by leave of the Court said plaintiff Julia A. McLain, filed her amended petition herein alleging the death of the said Carey McLain her appointment as executrix, of his estate by the Probate Court of Franklin County, Kansas, and that the defendant was indebted to her as such executrix the amount of said judgment and costs as rendered by the Circuit Court of Jackson County, Missouri. The Court finds that among other defences the defendant plead the two year statute of limitations and that the plaintiff Julia A. McLain, as executrix of said Carey McLain deceased was not the real party, in interest and had no title to the judgment which was the subject of the action. The Court finds that shortly after the death of the said Carey McLain an administrator of his estate in Missouri was duly appointed by the Probate Court of Jackson County, Missouri.

That said administrator duly qualified as such and included in his inventory of the property of the said Carey McLain, deceased, said judgment of the Circuit Court of Jackson County, Missouri, that said administrator is still acting and said administration in Jackson

County, Missouri has not been closed but is still in course of administration.

The Court finds that Julia A. McLain as executrix of the estate of said Carey McLain deceased is not the real party in interest in this case and that she cannot as such executrix prosecute this action on said judgment against the defendant M. V. B. Parker.

It is therefore now here considered ordered and adjudged by the Court that the defendant have judgment against said plain-
12 tiff Julia A. McLain, executrix of the estate of Carey McLain, deceased, for his costs herein expended taxed at $— and that execution issue therefore.

Endorsed: 17930. Julia A. McLain, etc., Appellant, v. M. V. B. Parker, Appellee. Notice of Appeal & Transcript. Filed Nov. 11, 1911. D. A. Valentine, Clerk Supreme Court.

13 And afterwards, on the 26th day of March, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, an Abstract of Record prepared by the Appellant, which Abstract of Record is in words and figures as follows, to-wit:

14 Filed Mar. 26, 1912. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 17930.

JULIA A. MCLAIN, Executrix of the Estate of Carey McLain, Deceased, Appellant,
vs.
M. V. B. PARKER, Appellee.

Abstract of Record.

Thurmond & Farrar, 903 R. A. Long Bldg., Kansas City, Mo., Attorneys for Appellant.

15 In the Supreme Court of the State of Kansas.

No. 17930.

JULIA A. MCLAIN, Executrix of the Estate of Carey McLain, Deceased, Appellant,
vs.
M. V. B. PARKER, Appellee.

Abstract of Record.

On the 5th day of May, 1906, this suit was begun by filing in the District Court of Johnson County, Kansas, a petition entitled,

CAREY MCLAIN, Plaintiff,
vs.
M. V. B. PARKER, Defendant.

16 The original petition recites: That on the 16th day of April, 1906, in a certain cause tried and determined in the Circuit Court of Jackson County, Missouri, wherein the above named plaintiff was plaintiff and the above named defendant was defendant, the said plaintiff, by the consideration of said Circuit Court, recovered a judgment against said defendant for the principal sum of $17,840.60, with interest at 6%, and recovered the further sum of $641.20, his costs in said action, which said judgment was duly rendered and entered by said court, as will more fully appear by a duly certified and authenticated copy of said judgment, attached to the petition, marked Exhibit "A," and made a part thereof.

That the Circuit Court of Jackson County, Missouri, is a court of general jurisdiction and said court had jurisdiction of the person of the defendant and of the subject matter of said action.

That the defendant is indebted to the plaintiff on account of said judgment in the principal sum of $17,840.60 and $641.20, costs, and prays judgment in the sum of $18,481.80, with interest and costs.

Attached to the petition was a copy of the judgment of the Circuit Court of Jackson County, Missouri, duly certified under the Act of Congress. This judgment, by reason of the fact that it incorporates a finding of facts by the Jackson County, Missouri, Court, is quite long, so that we will not abstract it here, but an abstract of it is contained, beginning on page 30 of the abstract of record filed in this Court, in cause No. 17772, to which reference can be made,
17 if it becomes material to have an abstract of the Missouri judgment.

An abstract of this judgment and finding of fact is also contained in the opinion of the Supreme Court of Missouri, in the case of Carey McLain v. M. V. B. Parker, which opinion was offered in evidence in this case; and which opinion will be found in the 129 Southwestern at page 500; also in the 229 Missouri Reports at page 68.

A writ of attachment was issued in this case and levied upon several pieces of property in Johnson County, Kansas, and on two pieces of property in Wyandotte County, Kansas. Various and sundry motions were filed by the defendant and by his wife and daughters, who claimed some of the property attached. Pleas in abatement were filed and answers to the pleas in abatement. The issues presented by the writ of attachment and the motions to dissolve and pleas in abatement were tried and determined by the court, after considerable evidence had been taken on these questions.

The attachment as to some of the property levied on was dissolved and as to other property sustained.

On the 10th day of April, 1907, a Motion to revive action
18 was filed in said court in words and figures as follows, to-wit:

CAREY MCLAIN, Plaintiff,
vs.
M. V. B. PARKER, Defendant.

Now comes Julia A. McLain, executrix of the estate of Carey McLain, deceased, and shows to the court that said Carey McLain, plaintiff, in this action, died at Kansas City, Mo., on the 19th day of January, 1907. That said Carey McLain was a resident of Franklin County, Kansas, at the time of his death and left a last will and testament. That said will was duly probated and admitted to record in the Probate Court of Franklin County, Kansas, on the — day of January, 1907, and afterwards, to-wit, on the — day of January, 1907, said Julia A. McLain, widow of said Carey McLain, was duly appointed executrix of the estate of said Carey McLain, deceased, by said Probate Court, and duly qualified as such executrix, and is now the legal and acting executrix of said estate.

Wherefore, the said Julia A. McLain asks the order of this Court that this action be revived in the name of said Julia A. McLain, as executrix of the estate of said Carey McLain, deceased, and that said action proceed in favor of said executrix as plaintiff, and against said defendant, M. V. B. Parker.

JULIA A. McLAIN,
Executrix of the Estate of Carey McLain, Deceased,
By W. R. THURMOND,
J. P. HINDMAN,
Her Attorneys."

19 An order reviving action was duly made and entered of record, and is in words and figures as follows, to-wit:

"First Day, May Term, May 6th, 1907.

No. 6724.

CAREY MCLAIN
vs.
M. V. B. PARKER.

Now, on this 6th day of May, 1907, the same being the first day of the May term of this Court, Julia A. McLain, executrix of the estate of Carey McLain, deceased, formerly plaintiff herein, appearing herein by W. R. Thurmond and J. P. Hindman, her attorneys, and the defendant, M. V. B. Parker, appearing by his attorney, I. O. Pickering.

By agreement of said parties the motion of said Julia A. McLain to revive this action came on to be heard at this time.

And the court having heard said motion, and being well advised in the premises and said defendant consenting to the revivor of this action in the name of said Julia A. McLain as executrix of the estate of said Carey McLain, deceased, the court doth sustain said motion.

It is therefore ordered and adjudged that this action be and the

same is hereby revived, in the name of said Julia A. McLain as executrix of the estate of the said Carey McLain, deceased, and that this action proceed in favor of said executrix as plaintiff and against said defendant, M. V. B. Parker."

And thereafter the following order staying proceedings was
20 entered, to-wit:

"Eleventh Day, September Term, September 17th, 1907.

In the District Court of Johnson County, Kansas.

Case No. 7624.

JULIA A. MCLAIN, Executrix of the Estate of Carey McLain, Deceased,
vs.
M. V. PARKER.

Now, on this 17th day of September, 1907, this cause coming on to be heard on the application of the plaintiff to have the issues in this cause of action at once made up and the time set for trial. Plaintiff appeared by W. R. Thurmond and Judge J. P. Hindman, her attorneys, and the defendant appeared by Major I. O. Pickering and Ogg and Scott, his attorneys, and the court having heard the matter and it being conceded that from the judgment of the Circuit Court of Jackson County, Missouri, pleaded by the plaintiff in this action, the defendant in this action has perfected an appeal to the Supreme Court of Missouri, except that he has filed no supersedeas bond.

It is now by this Court ordered that the trial of this cause be stayed until the Supreme Court of Missouri shall finally pass upon that judgment and the defendant in this action be required to plead in this Court and come within ten days after the filing with the Clerk of this Court of a copy of the mandate of the Supreme Court of Missouri in said cause and notice thereof given to the defendant in this action or his counsel.

C. A. SMART,
Judge pro tem."

21 Pursuant to this order plaintiff (appellant here) on the 17th day of September, 1910, filed a certified copy of said mandate which, omitting certificates of clerks, is in words and figures as follows, to-wit:

"In the Supreme Court of Missouri, April Term, 1910.

JULIA A. MCLAIN, Executrix of the Estate of Carey McLain, Deceased, Respondent,
vs.
M. V. B. PARKER, Appellant.

Appeal from Jackson County Circuit Court.

Now, on this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Jackson County Circuit Court rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant her costs and charges herein expended and have therefor execution. (Opinion filed.)"

After the order of revivor and after the order was made staying the proceedings, but before the Missouri case was decided in the Supreme Court of Missouri, and on, to-wit, the 25th day of March, 1908, the defendant filed in this cause a motion in words and figures and entitled as follows:

"In the Circuit Court, Johnson County, Kansas.

JULIA A. MCLAIN, Executrix of the Estate of Carey McLain, Deceased, Plaintiff,
vs.
M. V. B. PARKER, Defendant.

22 *Motion.*

Now comes the defendant, M. V. B. Parker, and shows to the court that the sureties on the attachment bond given by the plaintiff in said cause are insufficient, and defendant therefore moves the court for an order requiring said plaintiff to give additional security on the attachment bond in said cause.

Affidavits will be used on the hearing of this motion.

I. O. PICKERING,
Attorney for Plaintiff."

And on May 2, the defendant filed an affidavit in support of said motion in words and figures as follows:

No. 6724.

"JULIA A. MCLAIN, Executrix of the Estate of Carey McLain, Deceased, Plaintiff,
vs.
M. V. B. PARKER, Defendant.

Affidavit.

M. V. B. Parker, being first duly sworn states: That he is the defendant in the above entitled action. Affiant further states that the attachment bond filed herein by the plaintiff, Carey McLain, deceased, is insufficient; that the principal in said bond, the said Carey McLain, deceased since the execution of the said attachment bond, and that neither surety on said bond is a resident of the State of Kansas.

M. V. B. PARKER.

Subscribed and sworn to before me this 2d day of May, 1908.
GEO. W. FOHLMER."

23 The court heard said motion and overruled the same.

On the 30th day of December, 1910, the defendant filed an answer in this cause in words and figures and captioned as follows.

"In the District Court, Johnson County, Kansas.

No. 6724.

MCLAIN
v.
PARKER.

Answer.

Comes now the said defendant, M. V. B. Parker, and for his answer to the petition of the plaintiff herein filed, denies each and every material allegation and statement therein contained. Further answering said petition the defendant says that said plaintiff has no legal capacity to sue.

I. O. PICKERING,
Attorney for Defendant."

Answer being duly verified by the defendant.

On the back of said answer appears the following endorsement:

"Leave hereby given to file this answer out of time, not to delay trial by reason of such filing.

J. O. RANKIN, *Judge.*"

On the 4th day of January, 1911, the plaintiff (appellant here) filed an amended and Supplemental petition which, caption
24 omitted, is in words and figures as follows, to-wit:

"Now comes Julia A. McLain, executrix of the estate of Carey McLain, deceased, and for her amended and supplemental petition against the defendant herein says, that the plaintiff resides in Franklin County, Kansas, and that her postoffice address is Wellsville, Kansas; that this plaintiff is the duly appointed, qualified and acting executrix of the estate of Carey McLain, deceased; and as such entitled to maintain and prosecute this action; that said Carey McLain died on the 19th day of January, 1907, and at the time of his death was a resident of Franklin County, Kansas; that the said Carey McLain left a last will and testament wherein and whereby this plaintiff was named as executrix of his estate; that said will was duly probated and admitted to record in the Probate Court of Franklin County, Kansas, on the 25th day of January, 1907, and afterwards, to-wit: on the 25th day of January, 1907, this plaintiff, the widow of said Carey McLain, was duly appointed executrix of the estate of said Carey McLain, deceased, and letters testamentary issued to her, by the Probate Court of Franklin County, Kansas, and duly qualified as such executrix and is now the legal and acting executrix of the estate of said Carey McLain, deceased.

That on the 16th day of April, 1906, in a certain cause tried and determined in the Circuit Court of Jackson County, in the State of Missouri, wherein the above named Carey McLain was plaintiff and the above named defendant was defendant, said Carey McLain, by the consideration of said Circuit Court, recovered a judgment against said defendant for the principal sum of $17,840.60, which said judgment, according to its terms, bears interest at the rate
25 of 6% per annum, and recovered the further sum of $641.20, his costs in said action, which said judgment was duly rendered and entered by said court as will more fully appear by reference to a duly certified and authenticated copy of said judgment attached to original petition filed in this cause wherein Carey McLain was plaintiff and the said M. V. B. Parker was defendant, which said certified copy of said judgment is hereby referred to, and made a part of this petition as fully and to the same effect as if herein fully set forth and pleaded.

Plaintiff further states that said Circuit Court of Jackson County, Missouri, is a court of general jurisdiction and said court had jurisdiction of the person of the defendant and of the subject matter of said action.

Plaintiff further states that the said Carey McLain on the 5th day of May, 1906, filed in this cause and court his petition on said judgment and that on the 6th day of May, 1907, said cause entitled Carey McLain against M. V. B. Parker, defendant, was duly revived in the name of this plaintiff as executrix of the estate of said Carey McLain, deceased, and it was ordered by this Court that said action proceed in favor of said executrix as plaintiff and against M. V. B. Parker, as defendant.

Plaintiff further states that said defendant is indebted to this

plaintiff, as executrix aforesaid, for and on account of said judgment in the principal sum of $17,840.60, and the further sum of $641.20, as costs in said judgment adjudged to said Carey McLain, no part of which has been paid.

Wherefore, plaintiff prays that she, as executrix, as aforesaid, have and recover of the defendant the sum of $18,481.80,
26 together with interest thereon at the rate of 6% per annum from the 16th day of April, 1906, and for costs of suit.

W. R. THURMOND,
C. W. GORSUCH,
Attorneys for Plaintiff.

Copy hereof received this 3rd day of January, 1911.
I. O. PICKERING,
Attorney for Defendant."

Defendant's Answer.

To the foregoing amended and supplemental petition the defendant, on January 14, 1911, filed an answer covering nine pages of typewritten matter, and containing eight paragraphs or counts, alleging that the Circuit Court of Jackson County, Missouri, had no jurisdiction of the subject matter in the case in which it rendered judgment; that it never obtained jurisdiction of the defendant, because the defendant was fraudulently induced to come into the State of Missouri; that the District Court of Johnson County year statutes of limitations of Kansas, and also contained a general had no jurisdiction to try the case; pleaded the five year statute of limitations, of Missouri; pleaded the two and the three year statutes of limitations of Kansas, and also contained a general denial.

Thereafter, and on the 4th day of March, 1911, the defendant amended said answer by interlineation as follows:

"Ninth. Defendant further alleges that the said plaintiff has no legal capacity to sue."

27 The cause came on for hearing on the foregoing amended and supplemental petition and the answer of the defendant, before the Honorable J. O. Rankin, Judge of the District Court of Johnson County, Kansas, on the first day of June, 1911.

Evidence.

Plaintiff offered in evidence a certified copy of a judgment rendered by the Circuit Court of Jackson County, Missouri, on the 16th day of April, 1906, in a cause entitled Carey McLain, plaintiff, v. M. V. B. Parker, defendant, No. 22682, said copy of said judgment being certified under the Act of Congress, which judgment was in favor of the plaintiff in said suit, Carey McLain, and against the defendant in said suit, M. V. B. Parker, upon seven counts and aggregating the sum of $17,840.60.

Plaintiff also offered in evidence a certified copy (certified under

the Act of Congress), of the statement of costs taxed in the case of Carey McLain against M. V. B. Parker, in the Circuit Court of Jackson County, Missouri, showing the costs in said case due and unpaid to be the sum of $934.85.

The plaintiff (appellant here) offered in evidence a duly certified copy of the last will and testament of Carey McLain; the order of the Probate Court of Franklin County, Kansas, admitting said will to probate; certified copies of letters testamentary issued to Julia A. McLain.

The defendant objected to each and every offer separately for the reason that it was incompetent, irrelevant and immaterial
28 and that Julia A. McLain is not the real party in interest in this case and has no capacity to sue or maintain this action.

The court received said evidence subject to the objection.

Said will reads as follows:

Last Will and Testament of Carey McLain.

I, Carey McLain, of Wellsville, Franklin County, Kansas, make this my last will.

Item One. To my wife, Julia A. McLain, I give, devise and bequeath my home farm (describing it) in Franklin County, Kansas. Also all personal property on my home farm.

Item Two. To my daughter, Hannah M. Bruner, I give and bequeath (lot in Kansas City, Missouri), 80 acres of land in Johnson County, Kansas, and $3,000.00 in cash.

Item Three. I give, devise and bequeath to my son, James G. McLain (farm in Franklin County, Kansas, describing it).

Item Four. I give, devise and bequeath to my son, Harry C. McLain, $7,500.00 cash, to be paid to him by my executrix at the expiration of one year after my death. Also 25,000 shares of Double Eagle mining stock.

Item Five. I hereby appoint Julia A. McLain, executrix of this, my last will and testament, without bond and direct that she shall not be required to file any inventory of my estate.

(Also all land the testator owned in Louisiana and Texas.)

All my property, both real and personal, of every kind and nature, not herein specifically devised, I give and bequeath to my wife, Julia A. McLain."

29 Said will is duly signed and witnessed and marked "Filed, January 25, 1907. L. C. Crittenden, Probate Judge." Recorded in Record of Wills D, pages 10 and 11.

The order admitting the will to record and probate is in the usual and ordinary form, and dated January 25, 1907.

The letters testamentary are in the usual and ordinary form and appointed Julia A. McLain as executrix under date of January 25, 1907.

Plaintiff here rested her case.

The defendant offered in evidence copy of Letters of Administration with the will annexed of Carey McLain, deceased, in words and figures as follows, to-wit:

"STATE OF MISSOURI,
County of Jackson, ss:

To all persons to whom these presents shall come, Greeting:

Know ye that, whereas, the last will and testament of Carey McLain, late of the County of Franklin, State of Kansas, deceased, hath in due form of law been exhibited and proven and admitted to probate, a copy of which is hereto annexed; and, whereas, the executrix named therein is a non-resident of the State of Missouri, to the end therefore that the property of the said testator may be preserved for those who shall appear to have a legal right to or interest therein, and that said will may be executed according to the request of the testator, we do hereby appoint Harry C. McLean of Jackson County, State of Missouri, administrator, with the will of the said Carey McLain annexed, and authorize him, the said Harry C. McLain, as such administrator, to collect and secure, all and singular,
30 the goods and chattels, lands and tenements which were of the said Carey McLain, deceased, at the time of his death, in whoms-oever possession the same be found and to do and perform all such duties as may be enjoined upon him by said will, so far as there shall be property, and the law charges him and in general to do and perform all things which now are or hereafter may be required of him by law.

In Testimony Whereof, I, H. P. Hersperger, Clerk of the Probate Court, within and for the County and State aforesaid, have hereunto set my hand and affixed the seal of said court, at office in Kansas City, this 6th day of February, A. D. 1907.

H. P. HERSPERGER, *Clerk.*"

Defendant also offered in evidence a copy of an inventory of the estate of Carey McLain, deceased, which inventory contained a description of a lot in Kansas City, Missouri, cash in bank, notes, stocks and county warrants aggregating $19,511.71, and also the following:

"A judgment rendered on the 16th day of April, 1906, in Cause No. 22682, in the Circuit Court of Jackson County, Missouri, for the principal sum of $17,840.00, bearing interest at 6% (this cause now pending in the Supreme Court)," (no valuation given).

Defendant also offered the administrator's bond given by H. C. McLain, as administrator under the foregoing letters.

Defendant also offered Section 6013 of the Revised Statutes of Missouri, 1889, reading as follows:

"The plaintiff or his legal representatives may, at any time within ten years, sue out a scire facias to revive a judgment and lien;
31 but after the expiration of ten years from the rendition of the judgment, no scire facias shall issue. (R. S. 1879, p. 2732-c.)"

And Section 6023 of the same statutes reading as follows:

"If one or more plaintiffs in a judgment or decree shall die before the same is satisfied or carried into effect, the judgment or decree, if concerning the personalty, shall survive to the executors or administrators of such deceased party, and if concerning real estate, to his

or their heirs or devisees; and execution may be sued out in the name of the surviving plaintiff or plaintiffs, or legal representatives of the deceased plaintiff, for the benefit of himself or themselves, and the legal representatives of the deceased party; or the judgment or decree may be revived in the name of such legal representatives and the surviving plaintiffs, and execution sued out by them jointly. (R. S. 1879, p. 2742-*g*.)"

Dr. Harry C. McLain, called as a witness on behalf of the defendant, testified that he was the Harry C. McLain who was appointed administrator of the estate of Carey McLain, as shown by the copies of the letters of administration offered in evidence.

That he was still administrator of that estate, and that the item in the inventory of a judgment there stated to be in the Circuit Court of Jackson County, Missouri, referred to the judgment in issue in the case at bar.

Upon cross-examination he stated that Julia A. McLain was still the executrix under the will of Carey McLain.

32 In rebuttal plaintiff offered in evidence the mandate of the Supreme Court of the State of Missouri, heretofore set out; and also offered a copy of the amended petition filed in the Circuit Court of Jackson County, Missouri, in the case of Carey McLain v. M. V. B. Parker, No. 22682, and from the printed copy of the record, on an appeal in that case, the statement of the defendant that summons was duly issued and served on the defendant and that he filed his answer in that case.

Plaintiff also offered the answer and the reply of the plaintiff in that case.

The plaintiff also offered in evidence the decision of the Missouri Supreme Court, as shown in the 229 Missouri Reports at page 68 and in the 229 Southwestern Reporter at page 500, for the purpose of showing the law of Missouri in reference to the case in which the judgment is here sued on.

On October 2, 1911, the court below rendered judgment in favor of the defendant and in rendering judgment filed an opinion containing a statement of the case, the court's findings of fact and conclusions of law.

A copy of the judgment is found in the appeal papers in this Court and reference is made herein thereto.

In his Findings of Fact and Conclusions of Law the trial court said:

33 *"Statement.*

On the 16th day of April, 1906, Carey McLain recovered in the Circuit Court of Jackson County, Missouri, a judgment against defendant, M. V. B. Parker, for $17,840.60, principal, and $641.20 costs. On the 5th day of May, 1906, Carey McLain filed this present suit in this Court and alleged as a cause of action the judgment of the Circuit Court of Jackson County, Missouri, mentioned above. Honorable C. A. Smart, of Ottawa, Kansas, was called in to sit as special judge in this case, and for the reason that the judgment of the Circuit Court of Jackson County, Missouri was appealed

from the Circuit Court of Jackson County, Missouri, this Court stayed the further proceedings in this case until a transcript of the mandate of the Supreme Court of the State of Missouri should be filed in this Court. Carey McLain died testate on the 19th of January, 1907, before said action was heard in the Supreme Court of Missouri and before this case was heard in this Court. The will of Carey McLain was probated in Franklin County, Kansas, on the 25th day of January, 1907, and the plaintiff Julia A. McLain was appointed executrix of said will. This suit was revived in the name of Julia A. McLain, executrix of the estate of Carey McLain, deceased, on the 6th day of May, 1907.

On September 17, 1910, a certified copy of the mandate of the Supreme Court of Missouri, on the appeal from the judgment of the Circuit Court of Missouri, was filed in this Court. On January 4, 1911, the plaintiff filed an amended and supplemental petition alleging the death of Carey McLain and the appointment of the plaintiff as executrix, and alleging that the defendant is indebted to the plaintiff as executrix on account of said judgment in the sum of $18,481.80, with interest from April 16, 1906.

To this petition and amended and supplemental petition the defendant answers:

34 First. Denies that the Circuit Court of Jackson County, Missouri, had jurisdiction of the subject matter of the alleged action between Carey McLain and this defendant.

Second. Defendant alleges that the said Circuit Court of Jackson County, Missouri, never had jurisdiction of the person of the defendant; that the summons served upon him was procured by deceit and fraud.

Third. Defendant alleges that the judgment sued upon was a decree in equity and required certain things to be done by the plaintiff, and that the plaintiff in this action makes no offer of performance.

Fourth. Defendant further says that the judgment sued upon was a decree in equity and imposed mutual and dependent obligations upon the plaintiff and defendant, and that this Court has no jurisdiction to enforce the same.

Fifth. The defendant further alleges that part of the matters sued upon in the Circuit Court of Jackson County, Missouri, were barred by the Statute of Limitations of Missouri.

Sixth. Defendant denies generally each and every material allegation of the amended and supplemental petition.

Seventh. Defendant says that no cause of action accrued to this plaintiff within two years next before filing the amended and supplemental petition.

Eighth. Defendant says that no cause of action has accrued to this plaintiff within three years next before the filing of her amended and supplemental petition.

Ninth. Defendant alleges that the said plaintiff has no legal capacity to sue.

The plaintiff replies by general denial.

35 *Findings of Fact.*

The court finds that the defendant was legally summoned in the action in the Circuit Court of Jackson County, Missouri, and that service of summons was not procured upon him by fraud or deceit or by inveigling him into the State of Missouri.

The court finds further that Julia A. McLain is the duly, legally appointed executrix of the last will and testament of Carey McLain, deceased, by order of the Probate Court of Franklin County, Kansas. That Carey McLain's domicile was in the State of Kansas. That the defendant's legal residence was at all times mentioned in the suit in Johnson County, Kansas. That the said Julia A. McLain was appointed executrix by said Probate Court of Franklin County, Kansas, on the 25th day of January, 1907. The court further finds that H. C. McLain was duly appointed administrator with the will annexed of Carey McLain on the 6th day of February, 1907, by the Probate Court of Jackson County, Missouri, and said H. C. McLain qualified and filed inventory of said estate, which inventory included the judgment sued upon in this action.

Conclusions.

I conclude as a matter of law that the Circuit Court of Jackson County, Missouri, had jurisdiction of the person of the defendant in the suit of Carey McLain against M. V. B. Parker.

The defendant raises the question of the jurisdiction of the Circuit Court of Missouri over the subject matter of the action. This question is a matter that was determined by the Circuit Court of Missouri and affirmed by the Supreme Court of the State of Missouri, and the interpretation of the statutes of Missouri by the highest
36 tribunal of that state I think determines the question of the jurisdiction of that court over the subject matter sued upon in that action.

Another question that is raised in this case is the jurisdiction of this Court to enforce a decree in equity of another state. There are many of the older authorities which lay down the rule that a court of one state will not enforce a decree in equity of another state where there is something to be performed by each of the parties to said cause. It is true in this action that the judgment against the defendant is for a specific sum of money and that on the payment of such sum he was to receive certain deeds of conveyance. If the decree of the Circuit Court of Missouri required anything further to be done by the plaintiff; that is, if the plaintiff was required to execute deeds on the payment by the defendant of the sum of money found due, then this Court might not have jurisdiction to enforce such a decree, at least without the tender of the deeds in question; however, the decree of the Circuit Court of Missouri does not require the plaintiff to execute and deliver any deeds, but said decree recites:

'And the court further finds that plaintiff has filed in the office
the Clerk of this Court a proper deed, duly acknowledged by plai
tiff and his wife, conveying to defendant plaintiff's interest in sa
mining claim to be by the judgment and decree of this Court d
livered to defendant herein upon satisfaction of the judgme
herein.'

This finding is made upon each of the several transactions co
ered by the decree. As this decree requires nothing further to
done by the plaintiff, but recites that the deeds are in the hands
the court to be delivered on the satisfaction of the judgment, it
not such a decree in equity as the court of a sister state would refu
to recognize as a cause of action.

37 There are some other questions raised by the defendant
his answer and in the argument of the case, such as t
Statute of Limitations of the State of Missouri, on the matter su
upon in the Circuit Court of Missouri, but the Supreme Court
Missouri had full jurisdiction to determine the effect of the Missou
Statute, and that court has found against the defendant's contenti
in this case, and I do not deem it necessary to discuss these qu
tions at this time. The Constitution of the United States requir
that full faith and credit be given to the judgment of the court of
sister state, and this means that it shall be given such faith and cre
as it is entitled to in the state where rendered. The principal qu
tion which the court deems pertinent to the issues raised at this ti
is whether the evidence shows that the plaintiff had sufficient title
the cause of action to entitle her to a judgment in this case.

This suit was brought by Carey McLain in his lifetime on a jud
ment recovered in the Circuit Court of Jackson County, Missou
against the defendant, and after the death of Carey McLain th
case was revived in the name of this plaintiff, who is the executr
of the estate of Carey McLain in the State of Kansas. Harry
McLain was duly appointed administrator of the estate of Car
McLain for the State of Missouri. * * *

It therefore seems clear that the executrix appointed in Kans
had no title to the judgment sued upon in this action, but that t
title to the judgment was in the administrator appointed in Misso
and this case should have been revived in his name. * * *

For the reasons appearing above, the judgment in this case shou
be for the defendant.

J. O. RANKIN,
District Judge."

38 The appellant filed a motion for a new trial in the stat
tory form, which was overruled on the 1st day of Novemb
1911; and on the 1st day of November, 1911, the plaintiff du
served notice of an appeal upon the defendant, service of whi
notice of appeal was accepted by defendant's attorney, and sa
notice, with the acceptance of service thereon, was filed with t
Clerk of the District Court of Johnson County, Kansas, on Nove
ber 1, 1911.

Thereupon, in due time, the appellant filed in the court below

transcript of the stenographer's notes and the exhibits offered in evidence, and now brings the case to this Honorable Court for review.

39 *Assignments of Error.*

First. The trial court erred in its conclusion of law to the effect "That the executrix appointed in Kansas had no title to the judgment sued upon in this action, but that the title to the judgment was in the administrator appointed in Missouri and this case should have been revived in his name."

Second. The trial court erred in rendering judgment in favor of the defendant.

Third. The trial court erred in not rendering judgment for the plaintiff Julia A. McLain, executrix, for the amount sued for in the plaintiff's amended and supplemental petition.

Respectfully submitted,

THURMOND & FARRAR,
903 R. A. Long Building, Kansas City, Mo.,
Attorneys for Appellant.

40 *Index.*

41 And afterwards, on the 10th day of September, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Supplemental Counter Abstract prepared by the Appellee, which Counter Abstract is in words and figures as follows, to-wit:

42 Filed Sep.10, 1912. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of Kansas.

Number 17930.

JULIA A. MCLAIN, Executrix of the Estate of Carey McLain, Deceased, Appellant,
vs.
M. V. B. PARKER, Appellee.

Counter and Supplementary Abstract of Appellee.

I. O. Pickering, Attorney for Appellee.

43 In the Supreme Court of Kansas.

Number 17930.

JULIA A. MCLAIN, Executrix of the Estate of Carey McLain, Deceased, Appellant,
vs.
M. V. B. PARKER, Appellee.

Counter and Supplementary Abstract of Appellee.

A copy of the printed abstract prepared by counsel for appellant, was served upon us March 26th, 1912. We think this abstract is incomplete in many respects and fails to present necessary facts contained in the record. Appellant's abstract sets out what purports to be the full text of the amended petition of the plaintiff, while the answer of the defendant to said amended petition is not given in such adequate form as to inform this court of the real defenses interposed by the defendant in the trial court. While said answer is somewhat lengthy we venture to copy the same in full here
44 as the questions litigated below arose mainly, on the pleadings.

Copy of Answer to Plaintiff's Amended Petition.

(Caption and Signature Omitted.)

Answer.

Now comes the said defendant, M. V. B. Parker, and for answer to the amended and supplemental petition of the said plaintiff,

filed herein and for his defense to the alleged cause of action of the plaintiff says:

First. He denies that the Circuit Court of Jackson County, State of Missouri, referred to in said amended and supplemental petition, ever had or obtained jurisdiction of the subject matter of the alleged action between the said Carey McLain and this defendant. Defendant alleges that in each and every count and cause of action set up and pleaded by the said Carey McLain in said action against this defendant in the Circuit Court of Jackson County, Missouri, which is pleaded herein as cause of action against the defendant, alleged fraud and deceit on the part of this defendant by which the said Carey McLain was induced to purchase certain real estate or certain interests therein and to pay more than the actual cost of said interests and more than like interests in the same real estate purchased by the defendant whereby the said Carey McLain was deceived and defrauded and in said action said Carey McLain as a condition to the relief demanded by him, offered and agreed to convey to
45 this defendant by good and sufficient deeds all the real estate and all his interests therein which he had been induced to purchase through the alleged fraud and deceit of this defendant and demanded thereupon judgment against this defendant for the amounts alleged by him to have been paid for the purchase of said real estate respectively, with six per cent interest thereon from the dates of said several payments respectively. And defendant says that no part of said real estate, as alleged by said Carey McLain in his said petition in the Circuit Court of Jackson County, Missouri, was situated in said Jackson County, Missouri, but said Carey McLain specifically described said real estate in each and every count of his said petition as being situate in Socorro County, New Mexico, Johnson County, Kansas, Howell County, Missouri, Baxter County, Arkansas and elsewhere, but in no case was any part of said real estate alleged to be nor was any part of said real estate in fact situate in Jackson County, Missouri, the place where said alleged judgment was rendered against this defendant.

This defendant states and alleges that the laws of the State of Missouri, in force at the time of the trial of the action in the Circuit Court of Jackson County, Missouri, referred to and pleaded in defendant's amended and supplemental answer and which are still in full force and effect in said state provided as follows:

Copy.

"In Actions for Real Estate—Suits for the possession of real estate, or whereby the title thereto may be affected, shall be brought in the county within which such real estate, or some parts
46 thereof, is situate." Revised Statutes of Missouri 1879, Sec. 3483, and Revised Statutes of Missouri, 1889, Sec. 2011.

This defendant further says that the alleged judgment and decree, a part only of which is referred to and pleaded by the plaintiff in her amended and supplemental petition herein, was reciprocal and

provided in terms for the conveyance by said Carey McLain to the defendant, Parker, of the said real estate set out and described in each and every count of the petition respectively, upon the payment by the defendant to said Carey McLain of the amount of the judgment so, as alleged, severally rendered upon said counts, the aggregate sums of which are pleaded in the amended and supplemental petition herein. That the payment of any judgment by the defendant and the conveyance of the title to the real estate aforesaid by the said Carey McLain to the defendant were, by the terms of said judgment and decree, made reciprocal, interdependent and concurrent acts and that the terms of said judgment and decree contemplated and required the change and conveyance of the titles of all said real estate from the said Carey McLain to the defendant, M. V. B. Parker.

Wherefore this defendant says that said suit in the Circuit Court of Jackson County, State of Missouri, and the alleged and pretended judgment and decree of said Circuit Court, pleaded herein as a cause of action against this defendant, is void and of no effect because of want of jurisdiction of said Circuit Court of the subject matter of said suit.

47 Second. For further answer and defense to the amended and supplemental petition of the plaintiff herein, this defendant states and alleges that the Circuit Court of Jackson County, Missouri, never obtained jurisdiction of the person of this defendant; that defendant's presence in Jackson County, Missouri, at the time summons was served upon him in said cause, was induced and procured by the deceit, artifice, fraud and contrivance of the said Carey McLain, for the purpose of inveigling defendant to come within the jurisdiction of said Circuit Court from his home in Johnson County, Kansas, and causing a summons to be then and there served upon him. This defendant states and charges that such deceit, artifice, fraud and contrivance was willful, active and done with the purpose to deceive and decoy this defendant from his own home in Johnson County, Kansas, into the jurisdiction of said Circuit Court of Jackson County, Missouri, for the sole purpose of serving a summons upon him in said suit, which summons was caused to be issued and served by the procurement and direction of the said Carey McLain. That defendant was deceived thereby; that he believed and relied upon the statements and representations of the said Carey McLain and his attorney as hereinafter stated that said suit would be brought in Johnson County, Kansas and not in Jackson County, Missouri, and not suspecting that any suit would be brought against him by said Carey McLain, or that any summons would be served upon him in said cause, he went to Kansas City, in Jackson

48 County, Missouri, and, as he was returning to his home and while within the jurisdiction of said Circuit Court of Jackson County, Missouri, a summons was issued out of said court and said Carey McLain caused said summons to be served upon this defendant. And defendant says that no other summons or process except subpœnas was ever served upon him in said cause. Defendant further states that if he had not believed the statements

and representations of the said Carey McLain he would not have gone within the jurisdiction of said Circuit Court of Jackson County, Missouri. As facts constituting the fraud, deceit, artifice and contrivances by which said Carey McLain inveigled and procured defendant's presence within the jurisdiction of said circuit court for the purpose of service of a summons upon him, defendant alleges and states that for many years before the commencement of said suit and during most of the time covered by the alleged transactions between said Carey McLain and the defendant and upon which he based his claims against defendant, the said Carey McLain was a resident of Franklin County, Kansas, and the defendant was then, is now and for more than thirty years before the commencement of said suit had been, a resident of Olathe, in Johnson County, Kansas; that the southwest corner of Johnson County is the northeast corner of Franklin County, and the usual, ordinary and most direct route of travel from the home of the said Carey McLain in Franklin County to Kansas City, in Jackson County, Missouri, was by the Atchison, Topeka & Santa Fe Railway which runs diagonally
49 from northeast to southwest through said counties. That about two or three years before the commencement of said suit the said Carey McLain bought a house and home in Kansas City, Missouri, and removed to said home with his family from Franklin County, Kansas, and was thereafter living and making his home in Kansas City, Missouri, when said suit was commenced. That before said suit was commenced in Jackson County, Missouri, said Carey McLain, and his then and present attorney, W. R. Thurmond, informed defendant that a suit would be commenced by said Carey McLain against this defendant and the nature thereof. That this defendant is informed and charges the fact to be, that said attorney had been employed by the said Carey McLain for a year or more before said action was commenced and that during said time the principal if not the only business of said Carey McLain and his said attorney was working up a supposed case against this defendant based upon fraud and deceit as alleged against the defendant in various transactions, some of them alleged to have occurred nearly twelve years previous. Defendant says that after months of secret investigation, procuring ex parte affidavits and statements of persons concerning old and forgotten transactions, the manipulation of letters written years ago by defendant, distorting the meaning thereof and other acts, and construing everything as evidence of a dishonest purpose on the part of this defendant, the said Carey McLain in the month of January or February, 1905, announced his intention of bringing suit against this defendant and then stated to de-
50 fendant and to his attorney that he would institute, file and prosecute said suit in the District Court of Johnson County, Kansas, and then served upon this defendant a copy of his petition in which the venue was stated as follows: "In the District Court of Johnson County, Kansas, May term, 1905." The title of said cause was: "Carey McLain, plaintiff, v. M. V. B. Parker, defendant." The said petition contained eight separate counts and were identical in every respect with the petition which was within a few days there-

after, filed by said Carey McLain against the defendant in the Circuit Court of Jackson County, Missouri, except that in the latter the venue was changed from The District Court of Johnson County, Kansas, to the Circuit Court of Jackson County, Missouri. Each of said petitions were written and signed by the same attorney for plaintiff, W. R. Thurmond, who is the attorney for the plaintiff herein. After the statement by said Carey McLain and his attorney that said suit would be brought at defendant's home, in Johnson County, Kansas, and would not be brought and defendant would not be sued in Jackson County, Missouri, this defendant relied upon such statement and believed when he went to Kansas City, in Jackson County, Missouri, that said suit had been or would presently be filed and said suit commenced and prosecuted in the District Court of Johnson County, Kansas, and that but for such assurance, which defendant says was false and known to be false by said Carey McLain,
51 this defendant, being informed by said Carey McLain of his intention to bring such suit, would not have gone to Kansas City, Missouri, or within the jurisdiction of the Circuit Court of said county and state. Defendant states and charges that the purpose and intent of the said Carey McLain and his said attorney in declaring to him that said suit would be brought and prosecuted in the District Court of Johnson County, Kansas, and that no suit would be commenced in Jackson County, Missouri, against the defendant, and the serving of said petition on the defendant stating the venue as in the District Court of Johnson County, Kansas, was knowingly false and was meant to, and did deceive this defendant, whereby he was induced to go within the jurisdiction of the said Circuit Court of Jackson County, Missouri, where and when he was served with said summons by the direction of said Carey McLain and his said attorney.

Wherefore this defendant denies that said Circuit Court of Jackson County, Missouri, had any jurisdiction of the person of this defendant, and that the alleged judgment of said Circuit Court, based upon the service of summons so deceitfully and fraudulently procured cannot serve as the basis or constitute a cause of action in favor of the plaintiff and against the defendant.

Third. Further answering, this defendant states and alleges: That this court is without jurisdiction in this case for the reason that the alleged action or suit in Jackson County, Missouri, was a suit in equity brought by the said Carey McLain against this defendant,
52 wherein it was alleged that the said Carey McLain had been jointly interested with this defendant in a large number of transactions in each of which he alleged the purchase by himself and this defendant of certain specifically described real estate or interests therein; that in each case said purchases were made from third parties and in no case was the purchase alleged to have been made by said Carey McLain from this defendant, but in each case the ground alleged for relief in said suit in equity was that the said Carey McLain had reposed confidence in the defendant; that in such purchases the defendant had misrepresented to said McLain the cost price of said real estate as greater than the ac-

tual cost; that said Carey McLain was thereby deceived and had paid a price for the real estate deeded to him by said third parties or for the interest conveyed to him therein, in excess of the amounts paid by this defendant for like interests in said real estate conveyed to him at the same time. In his petition or complaint in said suit in equity in Jackson County, Missouri, said Carey McLain made profert of deeds of conveyance from himself to this defendant of each and every piece and parcel of real estate or interests therein which he had so purchased, demanded a rescission of all contracts and agreements by which he was induced to purchase said real estate and thereupon asked judgment against this defendant for the whole sum and sums which he alleged he had paid for said real estate and his interests therein with interest at six per cent per annum from the date of such purchase and payments respectively.

Said decree was predicated on such conveyances.

53 Defendant says that the plaintiff in her amended and supplemental petition herein is demanding judgment in this court for the alleged amount of money mentioned in the judgment and decree in equity in said Circuit Court of Jackson County, Missouri, alone, and makes no offer to convey said real estate or any interest therein to the defendant, upon payment of said alleged judgment. And defendant says that the conveyance of said real estate to the defendant is an integral part of said judgment and decree in equity; that said acts are by the terms of said judgment and decree reciprocal, inter-dependent and inseparable by the terms thereof. Defendant further states and alleges that no court other than that in which said alleged judgment and decree was rendered in said foreign state, even if said Circuit Court in Jackson County, Missouri, had jursidiction, which defendant denies, has any jurisdiction, right or authority to enforce the reciprocal obligations of the parties to that action as aforesaid.

Wherefore defendant says that for the reasons stated in this count and the further reason that the amended and supplemental petition herein does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant, this court is without jurisdiction in this case and defendant prays that this case be dismissed at plaintiff's costs.

Fourth. Further answering said amended and supplemental petition defendant says that the plaintiff ought not to have and

54 maintain this action against him for the reason that said alleged judgment and decree by the Circuit Court of Jackson County, Missouri, was not a judgment for the recovery of money only, but on the contrary, was a decree in equity imposing mutual and dependent obligations upon the plaintiff and the defendant in that suit and plaintiff herein ignores the obligations of her decedent and makes no offer to perform the conditions imposed by the terms of said decree which, in any case, would entitle him to recover from defendant the sums named in her amended and supplemental petition.

Fifth. The plaintiff, Carey McLain, in his suit in equity in the Circuit Court of Jackson County, Missouri, combined in his petition

or bill of complaint, seven distinct, disconnected and numbered causes of action and claimed deceit and misrepresentation on the part of the defendant in inducing him to purchase certain interests in certain real estate described in said separate counts respectively, and to pay more than the cost price of such interests and more than the defendant paid for like interests conveyed to him. In the first count he alleged that the transaction complained of occurred in the month of May, 1893, and that the fraud and deceit complained of occurred on said date. Said suit was not commenced in the Circuit Court of Jackson County, Missouri, until the month of February, 1905, about twelve years after the acts complained of. At the date of the commencement of said action or suit, the alleged cause
55 of action was barred by the statutes of the State of Missouri, of which the following is a copy:

"Period of Limitation Prescribed. Civil actions other than for the recovery of real property, can only be commenced within the periods prescribed in the following section, after the causes of action shall have accrued" (Revised Statutes of Missouri, 1879, Sec. 3228; Revised Statutes of Missouri, 1889, Sec. 6773).

"What within five years. * * * Fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud" (Revised Statutes of Missouri, 1879, Sec. 3230; Revised Statutes of Missouri, 1889, Sec. 6775).

Defendant pleaded said statute in his answer in bar of said first count in which was no allegation of discovery of the alleged fraud within ten years from the date of the alleged fraud.

Wherefore defendant says that as to said first count under the allegations of the petition or bill of complaint of the said Carey McLain and the plea of the bar of the statutes of limitations of the State of Missouri, no cause of action was stated against the defendant and the pretended findings and judgment on said first count, by said Circuit Court of Jackson County, Missouri, were and are an absolute nullity and are void.

Sixth. This defendant denies generally each and every material allegation, averment, statement and charge in said amended and supplemental petition contained.

56 Seventh. This defendant says that no cause of action has accrued to the plaintiff, Julia A. McLain as executrix of Carey McLain, deceased, against this defendant, within two years next before the filing of her amended and supplemental petition herein.

Eighth. This defendant says that no cause of action has accrued to the plaintiff, Julia A. McLain as executrix of Carey McLain, deceased, against this defendant, within three years next before the filing of her amended and supplemental petition herein.

Ninth. Defendant further alleges that the said plaintiff has no legal capacity to sue.

Wherefore, having fully answered said amended and supple-

mental petition, dependant prays that he may be hence dismissed with his costs.

The foregoing answer was duly verified as follows:

"STATE OF KANSAS,
Johnson County, ss:

M. V. B. Parker, being first duly sworn, states, that he is the defendant in the above entitled action; that he has read and knows the contents of his foregoing answer, and that the allegations, statements and denials therein contained are true as he verily believes."

The reply to said answer was a general denial not verified.

On the Trial.

To the first offer of evidence on the part of the plaintiff
57 (Appellant's Abstr. p. 13), the defendant objected specifically upon the ground that it was not and did not purport to be the whole record; that defendant had plead nul tiel record in his answer; that the paper offered was incompetent, irrelevant and immaterial and that the plaintiff had no legal capacity to sue or to prosecute this action. This offer did not contain the pleadings, summons or return, nor the material acts and proceedings of the court. To the second offer (Appellant's Abstr. p. 13) defendant at the time of the offer objected on the same grounds.

To the third offer (Appellant's Abstr. p. 13), defendant objected at the time upon the grounds and for the reason that the plaintiff had no legal capacity to sue or to prosecute this action, and that the evidence offered was incompetent, irrelevant and immaterial.

These three offers, viz: a certified copy of the judgment of the Circuit Court of Jackson County, Missouri; a certified statement of the costs in said case, and a certified copy of the appointment of Julia A. McLain as executrix of the estate of Carey McLain, deceased, by the Probate Court of Franklin County, Kansas, was all the evidence introduced or offered by the plaintiff when she rested her case (Appellant's Abstract, pp. 13, 14, 15).

Thereupon the defendant demurred to the evidence of plaintiff as follows:

"Now comes the said defendant, the plaintiff, having in-
58 troduced all of his evidence and rested his case, and demurs to said evidence for the reason and upon the ground that such evidence does not prove a cause of action in favor of said plaintiff and against said defendant."

Said demurrer was overruled by the court.

In addition to the evidence offered and introduced by the defendant to sustain the various defenses set up in his answer, as stated in appellant's abstract, pp. 15, 16, 17.

Defendant offered and introduced Sec. 3483 of Rev. Stats. of Missouri, 1879, being Sec. 2011 Rev. Stat. Missouri, 1889, as pleaded in his answer, to show that the action was local and not transitory and

that the Circuit Court of Jackson County, Missouri, had no jurisdiction of the subject matter.

Defendant also offered and introduced in evidence Sections 3228 and 3230 Rev. Stats. of Missouri, 1879, and Sections 6773 and 6775 Rev. Stats. Missouri, as pleaded in his answer for the purpose of showing that the first alleged cause of action in the original action in Jackson County, Missouri, was barred by the statutes of limitations when the action was commenced.

M. V. B. PARKER, sworn on his own behalf testified in substance as follows:

I live in Olathe, Johnson County, Kansas; I have lived here over forty years; I knew Carey McLain in his lifetime; I am personally acquainted with W. R. Thurmond, who was his attorney as long as he lived, and is now the attorney of the plaintiff in this
59 action. I had a conversation with Mr. Thurmond concerning a suit that was about to be brought by Cary McLain against myself. I knew at the time that he contemplated bringing such suit. This conversation took place in Mr. Pickering's office and was in relation to where this action should be tried whether in Johnson County, Kansas, or in Jackson County, Missouri, and Mr. Thurmond said at that time that the suit would be brought in Johnson County, Kansas. (Witness shown a paper purporting to be a petition entitled "Carey McLain vs. M. V. B. Parker. In the District Court of Johnson County, Kansas. May Term, 1905.") I received this paper from the hands of Mr. Thurmond but a short time before the commencement of the suit in the Circuit Court of Jackson County, Missouri, (Mr. Thurmond, after examination of the paper here admitted that it was substantially identical with the petition filed in the Circuit Court of Jackson County, Missouri, except the venue.) This paper was introduced in evidence by the defendant, as Exhibit "A."

WITNESS, continuing: I relied upon the statement of Mr. Thurmond and upon the service of this paper purporting to be a copy of the petition which he proposed to file, that the suit would be brought here at my home in Johnson County, Kansas, and not in Missouri. I knew that a suit was contemplated at that time by Carey McLain against myself and what he claimed. Knowing this, I would not have gone to Kansas City, Missouri, and within the jurisdiction of that court had I not believed said statements of Mr. McLain's
60 attorney that the suit would be brought here in this court and at my home. I relied upon said statements and on what purported to be a copy of the identical petition he intended to file.

On cross examination the witness stated: The conversation with you (Mr. Thurmond) was about the bringing of this suit; you said they were going to bring the suit and had concluded to bring it here at my own home; that it would be better for me and no worse for them. The assurance was that it would be brought here, in Olathe.

(By Mr. THURMOND:)

"Q. What were we there for?

A. I think you was there to tell us that you was going to sue us in Johnson County, when you didn't intend to do it."

(By Mr. THURMOND:)

"Q. You think my object was to come and tell you that we were going to sue you in Johnson County?
A. Yes, sir."
"Q. You say you relied upon the statement that I was going to sue you in Johnson County?
A. I did.
Q. How did you rely on it?
A. I thought you told the truth about it.
Q. Did you want to be sued?
A. No, sir.
Q. Did you change your condition in life or affairs in any way by reason of the fact I told you I was going to sue you?
A. I changed my position in regard to my personal conduct because you told me where I was going to be used.
Q. Was you trying to evade service of suit anywhere?
A. No, I didn't want to be sued in Missouri."

61 I. O. PICKERING, sworn as a witness for the defendant testified in substance as follows:

I have lived in Olathe since 1865, most of the time. I was acquainted with Carey McLain in his lifetime. His home was in Franklin County, Kansas. I am acquainted with W. R. Thurmond, the attorney for the plaintiff. Mr. Thurmond was in my office, I think in January, 1905. At that time he handed me this paper, exhibit "A," purporting to be a petition in an action presently to be commenced by said attorney for his client, Carey McLain against M. V. B. Parker entitled, "In the District Court of Johnson County, Kansas, May Term, 1905, and is signed by W. R. Thurmond as attorney for the plaintiff. There were present in my office at the time Mr. Thurmond, the defendant, Mr. Parker and myself. Mr. Thurmond said at that time that the suit would be brought here in this court and I expressed my satisfaction that the suit was to be brought at the home of my client, Mr. Parker. Thereafter I enquired at the clerk's office to know if the papers had been actually filed. It was but a few days after this that a suit was brought in the Circuit Court of Jackson County, Missouri, by Carey McLain, by his attorney W. R. Thurmond on identically the same petition except that the venue was changed from the District Court of Johnson County, Kansas, to the Circuit Court of Jackson County, Missouri.

On cross-examination.

(By Mr. THURMOND:)

Q. Was there some talk, Major, as to what court this suit would be brought in?
A. Yes, sir.
62 Q. Do you remember something of that kind?
A. Yes, sir, there was.

Q. Talks between you and me as to jurisdiction and things of that kind?

A. Yes, sir; I expressed satisfaction that the suit if it must be tried, would be tried here at Mr. Parker's home.

Q. There was some talk as to whether it should be tried elsewhere?

A. No, sir.

Q. Why were you and I discussing as to where that suit should be tried; do you remember that circumstance?

A. Why this exhibit "A" which we have in evidence here purported to be the very identical petition which you intended to file in that case, and it was entitled in the District Court of Johnson County, Kansas, May term, 1905.

The plaintiff objected to all this testimony of the witnesses, Parker and Pickering, for the reason it was incompetent and immaterial and did not tend to prove that the defendant, Parker, was deceived or inveigled into the jurisdiction of the Circuit Court of Jackson County, Missouri, for the purpose of obtaining service upon him in that State.

The plaintiff did not offer one word of testimony on the subject and there is nothing in the record from any witness or document in any manner tending to controvert this testimony on the part of the defendant showing that he was induced by artifice, fraud and deceit to come within the jurisdiction of the Missouri court.

63 HARRY C. MCLAIN, called as a witness on behalf of the defendant, testified in substance as follows:

I am the son of Carey McLain, deceased; shortly after his death, I was duly appointed as administrator of the estate of Carey McLain, by the Probate Court of Jackson County, Missouri. The administration of the estate is not yet closed and I am still the administrator of said estate in Jackson County, Missouri. (Witness shown paper purporting to be the inventory of the estate of Carey McLain in Jackson County, Missouri.) The judgment shown on this inventory is the same judgment in controversy in this action.

W. R. THURMOND, called as a witness on behalf of the defendant being duly sworn, testified in substance as follows:

I was the attorney for Carey McLain in the suit in Jackson County, Missouri, against the defendant, M. V. B. Parker. The judgment in that case is the same judgment sued on in this action by the plaintiff, Julia A. McLain, as executrix of the estate of Carey McLain, deceased. That judgment has never been revived in the Circuit Court of Jackson County, Missouri.

With the exception of the mandate of the Supreme Court of Missouri, offered in evidence on rebuttal by the plaintiff, which was objected to by the defendant at the time as incompetent, and immaterial, the other offers were clearly incompetent and hearsay and, if considered by the court in its decision were erroneously re-
64 ceived. All these offered items were objected to at the time as incompetent, irrelevant and immaterial, not the best evi-

dence and hearsay. The offers only purported to be printed copies from abstracts of the record in the case on appeal to the Missouri Supreme Court and in no case were they certified as originals or copies of originals.

The foregoing abstract is a correct abstract of those parts of the record not referred to or included in the abstract of the appellant or insufficiently stated in said appellant's abstract.

I. O. PICKERING,
Attorney for Appellee.

Olathe, April 15, 1912.

65 And afterwards, the court of its motion ordered transmitted to this court from the district court of Johnson county, Kansas, a certified copy of the judgment of the Circuit Court of Jackson county, Missouri, to be considered in connection with the abstract of the record, and made a part thereof, which judgment of the Circuit Court of Jackson county, Missouri, is in the words and figures, as follows, to-wit:

66 In the District Court of Johnson County, Kansas.

CAREY MCLAIN, Plaintiff,
vs.
M. V. B. PARKER, Defendant.

Petition.

Now comes the plaintiff and for cause of action against the defendant herein says; That the plaintiff resides at #2439 Troost Avenue, in Kansas City, Missouri, and that is his Post Office address.

That on the 16th day of April, 1906, in a certain cause tried and determined in the Circuit Court of Jackson County, in the State of Missouri, wherein the above named plaintiff was plaintiff and the above named defendant was defendant, the said plaintiff by the consideration of said Circuit Court, recovered a judgment against said defendant for the principal sum of $17,840.60, which said judgment according to its terms, bears interest at the rate of six per cent per annum, and recovered the further sum of $641.20, his costs in said action, which said judgment was duly rendered and entered by said Court as will more fully appear by reference to a duly certified and authenticated copy of said judgment hereto attached and annexed marked Exhibit "A" and made a part of this petition as fully and to the same effect as if herein fully set forth and pleaded.

Plaintiff further states that said Circuit Court of Jackson County, Missouri, is a court of general jurisdiction and said Court had jurisdiction of the person of the defendant and of the subject matter of said action.

Plaintiff further states that said defendant is indebted to this plaintiff for and on account of said judgment in the principal sum of

$17,840.60 and the further sum of $641.20 as costs in said judgment adjudged to said plaintiff, no part of which has been paid.

Wherefore, plaintiff prays that he have and recover of the defendant the sum of $18,481.80, together with interest thereon at the rate of six per cent per annum from the 16th day of April, 1906 and for costs of suit.

W. R. THURMOND,
JOHN A. EATON,
H. L. BURGESS,
Attorneys for Plaintiff.

67 PL'FF EX. 1. 1/7/11. G. D. W.

In the Circuit Court of Jackson County, Missouri, at Kansas City, April Term, 1906, April 16th, 1906.

No. 22682.

CAREY MCLAIN, Plaintiff,
vs.
M. V. B. PARKER, Defendant.

Now on this day this cause coming on regularly for trial came the parties in person and by their attorneys and the Court having heard the evidence and the argument of counsel and being fully advised in the premises doth find all and singular the facts in issue in this cause in favor of the plaintiff and against the defendant and having been requested by defendant to make special findings of facts, doth find the facts specially as follows:

On the first count of the petition the court finds that on or about and prior to May 29th, 1893, the plaintiff was a farmer and stock raiser residing in Franklin County, Kansas; that defendant was at all the times hereinafter mentioned and for many years prior thereto had been an attorney at law located at Olathe, Johnson County, Kansas; that on or about said May 29th, 1893 or prior thereto defendant stated to plaintiff that defendant could purchase certain mining claims known as the Big Giant and the Little Giant mining claims situated in Socorro County, New Mexico; That said claims were very valuable and exceedingly cheap at the price at which defendant could purchase them; and that the same would be a good bargain at said price; and the defendant then and there proposed to the plaintiff that plaintiff and defendant should go in together in the purchase thereof, each to own equal share therein.

That defendant represented to plaintiff that said mining claims would cost and that defendant would be required to pay therefor, the sum of $12,000, or $6,000 for the respective interests of plaintiff and defendant; that plaintiff was not accustomed to nor familiar with mining land, nor the value thereof; that plaintiff had some ten to twelve years theretofore known defendant and defendant had always professed to be a warm personal friend of plaintiff; that

plaintiff and defendant were members of the church and that defendant professed to be an earnest sincere Christian; that plaintiff placed implicit confidence in defendant's integrity, honesty, and loyalty to him and that defendant had for some years prior thereto invested moneys of the plaintiff in real estate loans and plain-
68 tiff had trusted defendant in said matters both with reguard to the form and character of the securities; that by reason of defendant's being a lawyer and real estate dealer, plaintiff reposed confidence in defendant's judgment and knowledge of mining property and relying solely upon the representations made by the defendant in reference to said mining claims, and in reference to the necessary cost price and expenses of said mining claims, plaintiff was induced to and did pay to the defendant the sum of $6,000 as part of the said purchase price which sum of money defendant then and there represented to plaintiff was necessary to secure plaintiff's half interest in said mining claim; that the defendant caused the deed to be executed by one Otto Hansen to the plaintiff and the defendant as grantees and represented to the plaintiff that he, defendant, had paid the sum of $6,000 for a one half interest in said claim.

The Court further finds that the statements of the defendant to the effect that said mining claims cost $12,000 and that they were worth $12,000 and that defendant had paid $6,000 for his share thereof were each and all of them false and were falsely and fraudulently made with the purpose and intent to deceive and defraud the plaintiff and said statements did deceive and defraud the plaintiff and plaintiff was induced by said statements and by his confidence in the defendant aforesaid to pay for his interest in said mining claims said sum of $6,000.

The Court further finds the fact to be that defendant only paid the sum of $2,000 for said mining claim.

The Court further finds that defendant planned to cheat and defraud the plaintiff in and about the purchase of said mining claim; that pursuant to said unlawful and fraudulent scheme and conspiracy, defendant had arranged in March 1893 to secure a purchaser for said mining claim at and for the price and sum of $2,000; that defendant caused said George W. Parker to go to New Mexico on or about May 29th, 1893 with the ostensible purpose of negotiating with said Hansen to purchase said claim at and for the price of $12,000, whereas defendant at said time had arranged to purchase said property at the actual sum of $2,000; that said Parker's mission to New Mexico was false, fraudulent and dishonest and with the purpose and intent upon defendant's part to deceive and impose upon plaintiff and obtain from him an excessive price for said property.

The Court further finds plaintiff's contribution to the purchase of said property to be $3,000 in cash and a farm in Franklin County, Kansas, taken at an agreed valuation of $3,000; that said cash was actually paid by the plaintiff to the defendant and that said
69 farm was conveyed by plaintiff to said St. John under the false and fraudulent and deceitful representations by the

defendant to him that St. John was to convey rental property of equal value to Hansen the seller of said mines whereas no conveyance of any property whatever from St. John to Hansen was contemplated by any of the parties thereto; and that by means of said trick, devise and fraud, said St. John obtained title to said farm worth $3,000 without giving any consideration therefor.

The Court further finds that defendant's only contribution to the purchase of said mining claims was property located in the town of Olathe, Johnson County Kansas of the value of about $1,400; that said property was conveyed to said Hansen without consideration and by said Hansen without consideration, conveyed again to said St. John. The Court further finds that defendant has received part of said money or property in amounts unknown. The Court further finds that defendant has during the times mentioned and ever since concealed the facts of said fraud and deceit and has always continued to represent to the plaintiff that said mining claims cost $12,000 and thereby prevented plaintiff from discovering the fraud perpetrated upon him as aforesaid; and that plaintiff did not discover such fraud and deceit; and did not discover the facts until the month of August 1903, and until within two years prior to the filing of plaintiff's petition.

The Court further finds that about the year 1900 plaintiff frequently requested defendant to make known to him the amount of money actually invested and expended in the purchase of said mining claims and the expense of maintaining and operating the working thereon. That defendant from time to time postponed making such accountings to the plaintiff and by repeated promises to make same and by fair representations that he was preparing same caused the plaintiff to believe that he had been honestly and fairly dealt with and thereby concealed his fraud as aforesaid. The Court further finds that after the discovery of the facts by the plaintiff, plaintiff has demanded the sum of $6,000 which the defendant has refused to pay and that the plaintiff prior to the institution of this action and within reasonable time of the discovery of the facts offered to convey to the defendant plaintiff's interest in said mining claims; and prior to the commencement of this action tendered to the defendant a deed conveying all his right title*d* and interest in said property upon condition that said defendant repay to him said sum and interest which tender defendant refused.

And the Court further finds that plaintiff has filed in the office of the Clerk of this Court a proper deed duly acknowledged by plaintiff and his wife conveying to defendant plaintiff's interest in said mining claim to be by the judgment and decree of this court delivered to defendant herein, upon satisfaction of the judgment herein.

The Court further finds that the plaintiff has been damaged in the sum of $10,620, wherefore it is considered ordered adjudged and decreed that the contract between plaintiff and defendant as to the ownership of said mining claim be and the same is hereby rescinded and for naught held; that the plaintiff have of and recover of and from the defendant the sum of $10,620, with interest thereon

from this date at the rate of 6% per annum and that upon the satisfaction of this judgment and decree the deed to the property aforesaid be delivered to the defendant herein.

The Court further considers, orders, adjudges and decreed that the plaintiff recover all of his costs herein laid out and expended and have execution therefor.

Upon the second Count the Court finds that on and prior to July 16th, 1896, plaintiff owned a certain lot with improvements thereon situated in Olathe, Johnson County, Kansas, worth $600; that on or about said date defendant stated and represented to plaintiff that the defendant had a purchaser who desired to buy said property and that said purchaser desired to give and exchange for said house and lot two hundred acres of land in Benton County, Mo., that defendant further represented to plaintiff that defendant was acquainted with said Benton County, Missouri, land and that the same was fully worth $600 or more and defendant advised plaintiff *the* trade said property in Olathe Johnson County, Kansas, for said Two hundred acres of land in Benton County, Missouri; that at said time and long prior thereto, a relation of trust and confidence had existed between plaintiff and the defendant and that defendant had acted as plaintiff's agent in procuring title to said property in Olathe, Johnson County, Kansas, and in collecting rents therefrom; that plaintiff placed confidence in defendant'- knowledge and judgment of the value of said Benton County, Missouri, land and relying solely upon defendant's representations with reference to the value of said land, and relying upon defendant's statement that he was arranging said exchange on behalf of a third person, plaintiff relied implicitly upon defendant's statement with reference to said value and being moved to do so by defendant's representations plaintiff was induced to and did agree to convey said house and lot in Olathe Johnson County, Kansas, for said land in Benton County, Missouri, and thereafter defendant delivered to plaintiff a deed for said Benton County, Missouri, land and when said deed was delivered to plaintiff, plaintiff observed that the grantor in said deed was one May L. Parker, daughter of defendant and
71 thereupon plaintiff inquired of defendant the occasion of the execution of said deed by defendant's daughter; that defendant then and there stated to plaintiff that the equitable owner of said land owed defendant a sum of money and defendant had taken title thereto in his said daughter's name as security for said money; that thereupon by reason of said explanation and still relying upon defendant's statement plaintiff accepted the deed to said Benton County, Missouri, land and executed and delivered to defendant the deed to said Olathe, Kansas, property.

The Court further finds that the representations of the defendant with reference to having a purchaser for plaintiff's property in Olathe, Kansas, and with reference to the value of the Benton County, Missouri, land and with reference to the owner of said land being indebted to defendant and defendant having taken a deed to said land in his daughter's name as security for such indebtedness were each and all false and fraudulent and made with the intention

of deceiving and defrauding plaintiff; and that they did, in fact, deceive and defraud and cheat the plaintiff out of his said property in Olathe, Kansas; that the facts were that the defendant at the time of the pretensions aforesaid was himself the owner of the Benton County, Missouri, land and had caused the title thereto to stand in the name of his daughter for defendant's own use and benefit.

The Court further finds that said Benton County, Missouri, land was wild and rockey timber land that the same was almost wholly worthless and has never been worth more than the sum of $200 and that defendant has sold and conveyed the house and lot in Olathe, Johnson County, Kansas, and the improvements thereon. The Court further finds that the defendant during all the times mentioned concealed the fact of his fraud and deceit, and has prevented the plaintiff from discovering the perpetration of the said fraud, and that plaintiff did not discover such fraud and deceit and did not discover that defendant was and had been the real owner of the Benton County land and that the same was of little value until within two years prior to the filing of his petition.

The Court further finds that although often requested so to do, the defendant has refused and still refuses to repay plaintiff the value of said Olathe, Kansas, property. The Court further finds that the legal description of the Benton County, Missouri, land is as follows: The North half of the South west quarter and the South east quarter of the South west quarter of section 9, Township 41, Range 20, and the North half of the North east quarter of section 18, Township 41, Range 20, in Benton County, Missouri.

72 The Court further finds that the plaintiff prior to the bringing of this action offered to convey to defendant all of his interest in said land and tendered to defendant a deed duly executed by himself and wife conveying to defendant all of plaintiff's interest therein upon condition that defendant pay to him said sum of $600 and interest which tender defendant refused, and refused to repay plaintiff the value thereof and that plaintiff has brought into Court and filed in the office of the Clerk a deed to his interest in said Benton County land to be by the judgment and decree of this Court delivered to defendant upon the satisfaction of the judgment herein; that plaintiff has been damaged by reason of the premises in the sum of $951.20. Wherefor it is considered, ordered, adjudged, and decreed that the plaintiff have and recover of and from the defendant the sum of $951.20 with interest thereon at 6% per annum and that the contract between the plaintiff and defendant with reference to the exchange of the properties aforesaid be and the same are hereby rescinded, annulled and set aside and that upon the satisfaction of the judgment herein, a deed to the land in Benton County, Missouri, now on file in the Office of the Clerk of this Court be delivered to the defendant. That the Court further considered orders, adjudges and decreed that the plaintiff recover all of his costs herein laid out and expended and have execution therefor. The Court further finds the facts upon the third count as follows: That on and prior to October 20th 1899 plaintiff

and defendant had been jointly interested in certain lands and business matters and that on and prior to said date defendant represented to plaintiff that defendant had discovered a very valuable mine of mineral land in Fulton County, Arkansas, consisting of 80 acres of land; that said land could be purchased cheap and defendant proposed to plaintiff that plaintiff and defendant go in together in the purchase of said eighty acres of land as well as in other deals and transactions and that after much solicitation upon the part of defendant plaintiff agreed with defendant that if defendant was convinced that said land was valuable for mining purposes that plaintiff would invest with the defendant in said land, and contribute an equal sum of money with the defendant and share equally in said land when purchased; that thereafter defendant purchased said eighty acres of land and took a deed therefor in his own name and afterwards conveyed to plaintiff a one half interest in said land and on or about said October 20th, 1899, caused a contract to be drawn and executed by the parties to this action setting out or purporting to set out their respective interests in said eighty acres of land and in certain other deals and
73 transactions, which said contract is in writing and is pleaded in full in the third count of plaintiff's petition.

The Court further finds that prior to the execution of said contract plaintiff had known defendant a long time, and that a relation of trust and confidence existed between them; that plaintiff placed confidence in defendant's judgment and knowledge and knowledge of mining property and relied upon the representations made by the defendant with reference to the value of said land and relied upon defendant's statement in the contract aforesaid that said eighty acres of land actually cost the sum of $2,200, and relied on defendant's statement as to the cost of the Huntzinger notes mentioned in said contract; whereby plaintiff was induced to and did sign and execute said contract and accepted said deed and paid the defendant the sum of $1,438.90 as plaintiff's due proportion of said eighty acres of land and the other items and interest mentioned in said contract together with plaintiff's expenses as set out therein. And the Court further finds that the statements made to plaintiff by defendant in parol and by said written contract with reference to the cost of said eighty acres of land in Fulton County, Arkansas, and as to the cost of the Huntzinger notes as mentioned in said contract were false and fraudulent and were made with the intent to deceive and defraud plaintiff and that plaintiff was induced thereby to pay to the defendant the sum of $1,438.90.

The Court further finds that in fact defendant only paid $200 for said eighty acres of land and not to exceed $340 for said Huntzinger notes. The Court further finds that defendant has, during all of said times and since the same concealed his said fraud and deceit and has always continued to represent to plaintiff that he paid the amounts of money mentioned in said contract and has prevented plaintiff from discovering the fraud perpetrated upon him as aforesaid; that plaintiff did not discover said fraud and deceit and did not discover the amount actually paid by defendant for said

property until on or about December 23rd, 1904, that defendant has although often requested so to do, failed and refused to repay plaintiff the sum of $1,438.90; that the Huntzinger notes mentioned in the said contract were secured by a deed of trust on property in Howell County, Missouri, which said deed was foreclosed, and at the sale thereof, the same was purchased by plaintiff and defendant and title thereto taken in the name of plaintiff, and that said last named real property was exchanged by consent of parties hereto for 2,500 shares of stock in the Anglo-American Oil Company and that plaintiff had before the commencement of this action
74 tendered to defendant said stock and also tendered to defendant a deed duly executed by himself and his wife conveying to defendant all of plaintiff's right, title and interest in and to said land in Fulton County, Arkansas, upon condition that defendant pay him the sum of $1,438.90, and interest which said tender defendant refused, and that plaintiff has brought into Court and filed in the office of the Clerk said certificate of stock and said deed to be delivered to defendant upon the satisfaction of the judgment herein and that plaintiff by reason of the premises has been damaged in the sum of $1,998.14.

Wherefore it is considered ordered, adjudged and decreed that the contract aforesaid, dated October 20th, 1899, be and the same is hereby set aside and for naught held that plaintiff have of and recover from defendant $1,998.14, and that upon the satisfaction of said judgment the deed to said land in Fulton County, Arkansas, and said certificate of stock be delivered to defendant.

The Court further considers orders adjudges and decreed that the plaintiff recover all of his costs herein laid out and expended and have execution therefor.

The Court further finds upon the fourth Count as follows:

That shortly after October 20th, 1899, defendant represented to plaintiff that the eighty acres of land adjoining the eighty acres of land mentioned in the contract set out in the first count of plaintiff's petition herein could be purchased cheap, and proposed that plaintiff and defendant go in together and purchase said eighty acres of land and contribute equally to the purchase thereof, and own said land in equal parts: that plaintiff expressed a willingness to go into said deal and defendant thereupon pretended to enter into negotiations for the purchase of said land and wrote to plaintiff from time to time that defendant was endeavoring to purchase said land for their joint ownership as favorably as possible and wrote to plaintiff that after repeated negotiations he had induced the owner of said land to reduce the price of said land to $380, and advised plaintiff that he and plaintiff purchase said land at said price which plaintiff accordingly agreed to do and paid to defendant $190 for plaintiff's one half interest in said land and $24 for plaintiff's share of the expenses of securing same; that defendant did procure a conveyance of said land from the owner thereof to plaintiff and defendant jointly said land being described as follows: The Northwest quarter of the Southwest quarter and the southeast quarter of Section 28, Township 31, Range 10 in Fulton County, Arkansas.

The Court further finds that at said time and prior and subsequent thereto, a relation of trust and confidence had existed
75 between plaintiff and defendant; that plaintiff placed confidence in defendant's judgment and knowledge of mining and real property, and relied solely upon the representations made by the defendant with reference to the value of said eighty acres of land; with reference to what same would cost; that plaintiff was thereby induced to and did pay defendant $214; that defendant caused a deed to be executed by the owner of said land one, J. C. Worsham, to said land to defendant and afterwards defendant conveyed one half, interest thereinto plaintiff, representing that defendant had paid an equal sum of money for defendant's half interest in said land.

The Court further finds that the statements of defendant that he had paid $380, for said land and that he had been negotiating with the owner thereof endeavoring to secure a reduction of the price and had finally succeeded in reducing the price to $380, and that the defendant had paid $190 for a one-half interest in said land, were each and all of them false and were falsely and fraudulently made with the purpose and intent of deceiving and defrauding plaintiff: and that said statements did deceive and defraud plaintiff; and that plaintiff was induced thereby by his confidence in defendant to pay defendant said sum of $214. The Court further finds that defendant did not in fact pay $380 for said land but on the contrary contracted to pay $200; that defendant has at all said times concealed the fact of his fraud and deceit aforesaid and has always continued to represent to plaintiff that said eighty acres of land cost $380, and has prevented plaintiff from discovering the fraud perpetrated upon him; that plaintiff did not discover such fraud and deceit and did not discover the facts at all until on or about December 23rd 1904; that although often requested so to do defendant has refused to repay plaintiff the sum of $214. The Court further finds that plaintiff has prior to the institution of this action offered to convey to the defendant plaintiff's interest in the said mining claims and tendered to the defendant a good and sufficient deed executed by himself and wife conveying all of plaintiff's right title and interest in and to said lands to defendant upon condition that said defendant repay him the said sum of $214, and interest which tender the defendant refused and refused to repay plaintiff said sum of $214; and that plaintiff has brought in to Court and filed in the office of the Clerk a deed conveying his said interest in said land to the defendant to be delivered to defendant upon satisfaction of the judgment herein; and that the plaintiff has been damaged in the sum of $295.32.

Wherefore it is considered ordered, adjudged and decreed that the contract between the plaintiff and defendant as to the owner-
76 ship of said land be rescinded and for naught held, and that plaintiff have and recover of and from the defendant $295.32, with interest from this date at the rate of 6% per annum and that the deed to said land be delivered to defendant upon satisfaction of the judgment herein.

And the Court further considers, orders, adjudges, and decrees that

plaintiff recover all of his costs herein laid out and expended and have execution therefor.

Upon the fifth count the Court finds the facts as follows:

That on or about the 5th day of January, 1901 defendant represented to plaintiff that defendant had discovered valuable mining land in Baxter County, Arkansas, and that defendant and one F. R. Cook intended to purchase said land and had contracted to purchase the same and proposed to plaintiff that as defendant and plaintiff had theretofore held certain lands jointly and had contracted with each other that each of said parties should have the right to take an undivided one half interest in any property obtained by the other in Howell County Missouri and Fulton County, Arkansas that plaintiff should associate himself with defendant on equal term- as to purchase price of said land so purchased or to be purchased by defendant and said Cook.

The Court further finds that Baxter County, Arkansas and Fulton County Arkansas and Howell County, Missouri are adjacent and that plaintiff did have such contract with the defendant as has been mentioned and that the same is set out in the third count of plaintiff's petition. The Court further finds that the defendant represented to plaintiff that said land was exceedingly valuable and within a short time thereafter such a quantity and quality of mineral would be discovered that said land could soon be sold for $50,000.

The Court further finds that at said time plaintiff was confined at home by illness and made no investigation for himself as to the value of said land and at the earnest solicitation of defendant finally agreed to take a two twelfths' interest in said land upon the understanding and agreement with defendant that plaintiff should pay two twelfths of the price at which said property was to be purchased from the owner; and thereupon the agreement in writing was entered into between the plaintiff and defendant and said Cook which is set out on the fourth count of plaintiff's petition; that on said date upon execution of said agreement plaintiff paid defendant $1,000 on account of said two twelfths' interest in said land; and thereafter paid to the defendant an additional sum of $588 for an additional one sixth interest in said land; making a total paid by plaintiff
77 for four twelfths' interest in said land of $1588. The Court further finds that at said time plaintiff and defendant, for a long time and have since been in a confidential relation with one another; that plaintiff placed confidence in defendant's judgment and knowledge of mining property and relied solely upon the representations made by the defendant with reference to what said mining claims would cost and trusting entirely to defendant to see that the deeds thereto were properly drawn was induced to and did pay the sum of $1000 as part of the purchase price for a one sixth interest in the land on or about January 5th 1901 and paid an additional sum of $588 at a later date for another one-sixth interest in said land.

The Court further finds that in and by the contract pleaded in said fifth count defendant and said Cook conspiring together falsely and fraudulently intending to and did represent to plaintiff that the

total cost of said mining claim was the sum of $6000, and that said claim was very valuable but that each and all of said representations were false and falsely and fraudulently made with the purpose and intent of deceiving and defrauding plaintiff; and that said statements did deceive and defraud plaintiff and plaintiff was induced by said statements and by his confidence in defendant as aforesaid to pay said sum of $1588 for a two sixths interest in said land.

The Court further finds that defendant did not pay the sum of $1000 for said one-sixth interest; that said land did not cost to exceed the sum of $1010 and that the balance of said $1588 paid by plaintiff was appropriated by the defendant and converted by the defendant to his own use.

The Court further finds that defendant has during all said time and ever thereafter concealed the facts of his fraud and deceit and has always continued to represent to plaintiff that said land did cost the sum of $6000 and by his acts has prevented plaintiff from discovering said fraud and plaintiff did not discover the same until on or about December 23rd, 1904; that defendant although often requested so to do has refused to repay plaintiff the sum of $1588 but that plaintiff has offered to convey to defendant plaintiff's interest in said lands and before the commencement of this action tendered to defendant a good and sufficient deed conveying all his right title and interest in and to same upon condition that said defendant pay him said sum of $1588 and interest which tender the defendant refused and refused to repay plaintiff said moneys and that plaintiff has brought into Court and filed with the Clerk a deed duly executed conveying to defendant plaintiff's interest in said lands to be delivered to defendant on satisfaction of the judgment herein; and that plaintiff has been damaged by reason of the premises in the sum of $2050.03.

78 Wherefore, it is considered ordered adjudged and decreed that the contract between plaintiff and defendant as to the ownership of said land be rescinded, annulled and for naught held and that plaintiff have and recover of and from defendant $2050.03 with interest from this date at the rate of 6% per annum, that upon satisfaction of this judgment the deed to said land shall be delivered to the defendant.

And the Court further considered orders, adjudges, and decrees that the plaintiff recover all of his costs herein laid out and expended and have execution therefor.

Upon the sixth count of plaintiff's petition the Court finds the facts to be as follows:—

That on or about the 30th day of September, 1901, defendant stated to plaintiff that defendant could purchase certain land in Baxter County, Arkansas, described as follows:

The West half of the Southwest quarter of Section 2, the Southeast quarter of the Southeast quarter of Section 3, Township 20, Range 13.

That said land was very valuable for mining and would be exceedingly cheap at the price for which defendant could purchase it, and defendant proposed to plaintiff that as plaintiff and defendant

were associated together in other deals and inasmuch as there was a contract existing between them whereby he had the right to take an interest in any such lands that plaintiff should go in with defendant in the purchase thereof; that there did actually exist such a contract being the contract pleaded in the third account of plaintiff's petition; that a relation of trust and confidence existed between the parties at that time and had long prior thereto, and had for a long time subsequently thereto existed; that plaintiff reposed confidence in defendant's judgment and knowledge of mining property and trusted the defendant to procure proper deeds of said property and relying upon the representations of defendant as to the value of said land was induced to and did pay $1500 for a one-half interest therein, and gave defendant $1500 to purchase said half interest; that thereupon defendant caused a deed to be executed by one F. R. Cook reciting the consideration of $1.00; that the same was not discovered until January 19th 1905. The Court further finds that said F. R. Cook and defendant had previously thereto, entered into a conspiracy to cheat and defraud plaintiff and that said Cook was at said last mentioned times an agent and accomplice of defendant in effecting said cheat and fraud: that the statement of defendant as to the value of said land were false and fraudulent and made with the purpose and intent to deceive and defraud plaintiff and that they
79 did deceive and defraud plaintiff and that plaintiff was induced by said statements and by his confidence in said defendant to pay for said one-half interest, the sum of $1500.

The Court further finds that said land was not worth the sum of $1500 and never has been worth to exceed $200 and that defendant only paid for said land the sum of $900.00 and did appropriate and convert to his own use of said moneys paid to him by said plaintiff the sum of $1000.00; that defendant has during all the times herein mentioned concealed the facts of his fraud and deceit and has always continued to represent to plaintiff that said half interest in said land was of the value of $1500; and that by his acts aforesaid has prevented plaintiff from discovering the fraud perpetrated upon plaintiff as aforesaid and that plaintiff did not discover such fraud and deceit and did not doscover the fact as to the moneys paid and said fraudulent conversion until after August 1st 1905; that although often requested so to do defendant refused and still refuses to pay to plaintiff the sum of $1500; that plaintiff has offered to convey to defendant plaintiff's interest in said land and prior to the commencement of this action tentered to the defendant a good and sufficient deed conveying his right title and interest in and to said land to defendant upon the condition that defendant pay him the sum of $1500 and interest which tender defendant refused and plaintifr has brought into Court and filed with the Clerk a deed duly executed by himself and wife conveying to defendant plaintiff's interest in said land to be delivered to defendant upon satisfaction of the judgment herein; and that plaintiff has been damaged in the sum of $1,909.

The Court further finds however that on or about July 17th 1902 the plaintiff received as his share of the proceeds of a certain sum

paid as forfeit money on account of an option contract on said land; the sum of $571.43 and that plaintiff shou-d be charged with said sum of $571.43 and interest thereon from July 17th, 1902, amounting to the total sum of $700.09, leaving the amount due the plaintiff on this count the sum of $1208.91.

Wherefore it is considered ordered adjudged and decreed that the contract between plaintiff and defendant as to the ownership of said land be rescinded annulled and for naught held, and that the plaintiff have and recover of and from defendant $1208.91 with interest thereon from this date at the rate of 6% per annum and that upon satisfaction of the judgment herein, said last named deed be delivered to the defendant. The Court further considers adjudges orders and decrees that the plaintiff recover all of his costs herein laid out and expended and have execution therefor.

80 Upon the seventh count herein the court finds that the tender hereinbefore made of a certain deed by the plaintiff to the defendant upon payment by defendant to plaintiff of a certain sum of money has been accepted and that said sum of money has been paid: and that said cause of action has been extinguished and eliminated.

Upon the eighth Count herein the Court finds the facts to be as follows: That on or about December 26th 1902, defendant and said F. R. Cook approached plaintiff and represented to him that said Cook had an option to purchase the following described land in Howell County, Missouri, to-wit:

Ten acres in the North Half of Lot 3, of the South west quarter of section 7, Township 22, Range 10, known as the Honest Joe Mine, and that said option was made to expire and that said Cook did not possess enough money to hold said option; thereupon defendant proposed to plaintiff *and* defendant and plaintiff go in with said Cook in the purchase of said option, and each take an equal interest therein, and defendant then and there represented to plaintiff that said land could be purchased for and must necessarily cost $1800, and that if plaintiff would contribute $600 for the purchase of one third interest therein that defendant and Cook would each contribute $600 for the purchase of the remaining interest.

The Court further finds that at said time long prior and subsequent thereto a relation of trust and confidence existed between the parties to this action. That plaintiff placed confidence in defendant's judgment and knowledge of mining property, and relied solely upon represe*n*tations of defendant with reference to the value of said land and with reference to what the said land would cost and that plaintiff was thereby induced to and did pay $600 as part of the purchase price which defendant represented to plaintiff was necessary to secure a one third interest in that land: that thereafter a deed as executed by said Cook to plaintiff conveying to plaintiff an undivided one half interest in said land more particularly described as follows;

A part of the North half of Lot 3, of the South west quarter of section 7 Township 22, Range 10, in Howell County, Missouri, more particularly described as follows; Beginning at the North east cor-

ner of said Lot 3, running thence West 220 yards, thence South 220 yards, thence East 220 yards, thence North 220 yards to the beginning. The Court further finds that the statements of defendant and of said Cook, made by said Cook in defendant's presence, that Cook possessed an option upon said land; that the same would cost
81 $1800 and that the defendant and said Cook would contribute, and were contributing each the sum of $600 for a one-third interest in said land, were each and all false and fraudulent and were known by them to be false and fraudulent when made and were made with the false and fraudulent intent to deceive cheat and defraud the plaintiff and that said statement did deceive cheat and defraud plaintiff and that plaintiff relied thereon and on account of the confidence which he reposed in defendant and being induced thereby did pay $600 for a one-third interest is said land; that at said time said Cook did not have an option on said land but he and defendant in fact owned said land outright and had paid therefor only the sum of $150 for the entire interest therein and that said land was worth no more.

The Court further finds that defendant has during all said time and ever thereafter concealed the facts of his fraud and deceit and has always continued to represent to the plaintiff that said land cost $1,800 and by reason of his action has prevented plaintiff from discovering the fraud perpetrated against him and plaintiff did not discover such fraud and deceit until on or about the 23rd day of December 1904; that although often requested so to do defendant has refused to pay plaintiff said $600 or any part thereof; that plaintiff has offered to convey *the* the defendant plaintiff's interest in said land prior to the institution of this action tentered to defendant a deed conveying all his right title and interest in and to the same to defendant upon condition that defendant pay him the said sum of $600 and interest which tender defendant refused; and that plaintiff has filed in the office of the Clerk a deed executed by himself and wife conveying to defendant plaintiff's interest in said land to be delivered to defendant upon satisfaction of judgment herein and that plaintiff has been damaged in the sum of $717.

Wherefore it is considered ordered adjudged and decreed that the contract between the plaintiff and defendant as to the ownership of said property be rescinded annulled and for naught held and that plaintiff have and recover of and from the defendant the sum of $717 with interest from this date at the rate of 6% per annum and that upon the satisfaction of said judgment the deed to said property be delivered to the defendant. And the Court further considers orders adjudges and decrees that the plaintiff recover all costs herein laid out and expended and have execution therefor.

And it is considered ordered adjudged and decreed by the Court that the plaintifr have and recover of and from the defendant the aggre-ate sum of $17,840.60 on all of the counts herein mentioned.

82 It is also ordered by the Court that the stenographer's fees of this Court for the writing of the transcript of the testimony herein made by the order of this Court, amounting to the sum

of five hundred seventy two 30/100 Dollars be and the same is hereby taxed as costs in this case..

To each and every finding of fact separately upon each and every count and to each and every conclusion of law and to the decree and judgment upon each count separately and as a whole the defendant at the time excepted and still excepts.

Attest:
A true Copy.
[SEAL.] HARRY C. HENLEY, *Clerk*,
By J. O. FLAHERTY, *D. C.*

83 *Authentication (under act of Congress).*

STATE OF MISSOURI,
County of Jackson, ss:

I, Harry G. Henley, Clerk of the Circuit Court within and for the County and State aforesaid do hereby certify that the foregoing is a full true and complete transcript of the Decree and finding in case No. 22682 entitled Carey McLaim plaintiff against M. V. B. Parker defendant as the same now appeares in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court dome at Kansas City this 23rd day of April A. D. 1906.
[SEAL.] HARRY G. HENLEY, *Clerk.*

STATE OF MISSOURI,
County of Jackson, ss:

I, the undersigned Presiding Judge of the Circuit Court within and for the county and state aforesaid do hereby certify that Harry G. Henley is the duly elected commissioned qualified and acting Clerk of said Court and as such is the custodian of the records and papers thereof and his foregoing attestation is in due form and according to law.

Witness my hand this 23rd day of April A. D. 1906.
[SEAL.] J. H. SLOVER,
Presiding Judge of the Circuit Court of Jackson County.

84 THE STATE OF KANSAS,
Tenth Judicial District, Johnson County, ss:

I, S. W. Alderson, Clerk of the District Court of the Tenth Judicial District of the State of Kansas, sitting within and for the County aforesaid do hereby certify the above and foregoing to be a true, full and complete copy of the *copy of the* Decree and findings of the Court in case No. 22682 entitled Carey McLain vs. M. V. B. Parker as the same remains of record in my Office.

Witness my hand and the seal of said Court this the 23rd day of June A. D. 1913.

S. W. ALDERSON,
Clerk of the District — of Johnson County.

85 Be it further remembered, that afterwards, on the 8th, day of January, 1913, the same being one of the regular judicial days of the January, 1913, term of the Supreme Court of the State of Kansas, said Court being in session at its court room in the city of Topeka, the following proceeding among others, was had and remains of record in words and figures as follows, to-wit:

86 In the Supreme Court of the State of Kansas.

WEDNESDAY, January 8, 1913.

No. 17930.

JULIA A. MCLAIN, Ex'x, etc., Appellant,
vs.
M. V. B. PARKER, Appellee.

This cause comes on to be heard on the notices of appeal, transcript of the judgment and abstract of the record of the district court of Johnson county; and also comes on to be heard the motion of the appellant for leave to amend the abstract heretofore filed; thereupon after oral argument by W. R. Thermond for the appellant and by I. O. Pickering for the appellee, said cause and motion are submitted on brief of counsel for both parties and taken under advisement by the court.

87 And afterwards, on the 8th day of February, 1913, the same being one of the regular judicial days of the January, 1913 term of the Supreme Court of the State of Kansas, said court being in session in its court room in the City of Topeka, the following proceeding among others was had and remains of record in words and figures as follows, to-wit:

88 In the Supreme Court of the State of Kansas.

SATURDAY, February 8, 1913.

No. 17930.

JULIA A. MCLAIN, Ex'x, etc., Appellant,
vs.
M. V. B. PARKER, Appellee.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be reversed, and that this cause be remanded with directions to render judgment for the plaintiff. It is further ordered that the appellee pay the costs of this case in this court taxed at $—, and hereof let execution issue.

89 And on the same day, to-wit: this 8th day of February, 1913, there was filed in the office of the Clerk of the Supreme

Court of the State of Kansas, the Court's Syllabus and Opinion, in the above entitled case which Syllabus and Opinion are in words and figures as follows, to-wit:

90 No. 17930.

JULIA A. MCLAIN, as Executrix of the Estate of Carey McLain, Deceased, Appellant,

v.

M. V. B. PARKER, Appellee.

Appeal from Johnson County.

Reversed.

Syllabus by the Court, Mason, J.

1. An allegation that a defendant was inveigled into another state for the purpose of obtaining service upon him is not sustained by proof that he would not have gone to that state except for the fact that the plaintiff had told him the action was to be brought in Kansas.

2. A contention that a judgment rendered in another state is void for want of jurisdiction of the subject matter, which turns upon the construction of the statute of that state, is not maintainable where upon appeal the judgment has been affirmed by the court of last resort.

3. An action may be brought upon the decree of a court of equity of another state adjudging the unconditional payment of money, notwithstanding that as a preliminary thereto the party in whose favor such judgment was rendered was required to deposit certain deeds with the clerk to be delivered to the debtor upon the payment of the judgment.

4. Upon the death of the plaintiff in an action upon a judgment rendered in another state, both parties being residents of Kansas, a revivor is properly had in the name of the executor appointed in this state, notwithstanding an administrator has been appointed in the state where the judgment was rendered.

91 5. A defendant who, upon the death of the plaintiff, expressly consents to an order reviving the action, can not be heard to maintain that the revivor was void because not made in the name of the proper representative.

6. Where, upon the death of the plaintiff, an action upon a judgment rendered in another state is properly revived in the name of the personal representative, a recovery will not be prevented by a failure to revive the foreign judgment.

7. To recover upon a judgment rendered in another state by a court of general jurisdiction, it is not ordinarily necessary to introduce copies of any part of the record except that showing the rendition of the judgment.

All the Justices concurring.

A true copy. Attest:

CLERK SUPREME COURT.

92 No. 17930.

The opinion of the court was delivered by MASON, *J.*:

Carey McLain obtained a judgment in a circuit court of Missouri against M. V. B. Parker, both being residents of Kansas. He then sued upon the judgment in this state. While the action was pending he died, and it was revived in the name of his executrix. The defendant contended (1) that the Missouri judgment was void because the court rendering it had no jurisdiction of his person or of the subject matter, (2) that it was but a part of a decree which required the performance of other acts than the mere payment of money, and therefore would not support an action in this state, and (3) that the executor had no authority to maintain the action, that an administrator having been appointed in Missouri, the Kansas action could be revived only in his name, and that the Missouri judgment was extinguished by the failure to revive it within a year from McLain's death. The trial court ruled against the first two contentions, but sustained the third, and rendered judgment for the defendant accordingly. The executrix appeals.

The contention that the Missouri court had no jurisdiction of the defendant's person is based upon testimony to this effect: Before the action was begun McLain's attorney told Parker that it would be brought in Johnson County, Kansas, where both parties resided; if it had not been for this statement Parker would not have gone to Missouri; a short time afterwards he was served with summons in Kansas City, Missouri. There was no evidence that his trip to Kansas City was in any way induced by the plaintiff. We do not think the mere statement that the action was to be brought in Kansas can be regarded as an agreement that it should not be brought elsewhere, or as a sufficient foundation for the claim that the defendant was inveigled into another jurisdiction. The contention that the Missouri court was without jurisdiction of the subject matter is based upon the fact that as a preliminary to the recovery of a judgment against the defendant, the plaintiff was required to execute to him deeds to property not situated in the county where the action was brought, while a Missouri statute requires "suits
93 for the possession of real estate or whereby title thereto may be affected" to be brought in the county in which at least some part of it is situated. The question presented concerns the construction of the Missouri statute. Upon appeal to the supreme court of that state the judgment was affirmed, and this must be regarded as an authoritative interpretation in favor of the jurisdiction exercised.

The Missouri judgment was based upon a petition declaring upon several distinct transactions, each pleaded as constituting a separate cause of action. In each instance the plaintiff asked to have the court annul on account of fraud a contract which he had made with the defendant for the purchase of real estate, two tracts being situated in Missouri (but not in the county where the action was brought) and the rest in Arkansas or New Mexico. As a condition to recovery upon each transaction the court required the plaintiff

to execute and deposit with the clerk a deed to the property involved, naming the defendant as the grantee. The plaintiff complied with this condition before the judgment was rendered. He was given an absolute and unconditional judgment for the recovery of a specific sum of money upon each count, but the decree included a provision that upon the satisfaction of each item of such judgment the corresponding deed should be delivered to the defendant.

It is said that an action can not be brought upon the decree of a foreign court ordering a payment of money, if it also requires the performance of some other act. (23 Cyc. 1504-1505, 1560;
13 A. & E. Encycl. of L. 1008;
2 Black on Judgments, secs. 869, 962; (2d ed.)

2 Freeman on Judgments, 4th ed., sec. 434.) The application of this rule is illustrated, and the limit upon its operation is shown, in Du Bois v. Seymour, 81 C. C. A. 590, 593, 152 Fed. 600, where it was said:

"Final decrees of courts of equity have the same conclusive effect as to questions of fact determined by them as judgments at law. If a final decree adjudges a fixed and certain sum to be due
94 and owing from the defendant to the complainant, and nothing more, an action at law may be maintained on it for the recovery of the sum so adjudged to be due and owing; but the decree must be an unconditional one. The specific sum of money adjudged to be due must be payable, in all events. If there be a condition annexed to the decree which renders it uncertain whether payment shall ever be obligatory, the decree is not a record on which the common-law action of debt or any other action at law instituted for the purpose of recovering a debt, can be founded." (p. 593.)

Here the court rendered an ordinary money judgment, collectible upon execution. Its enforcement was not made to depend upon any act to be subsequently performed. When it was paid or satisfied the defendant was entitled to receive the deeds from the clerk, but the plaintiff had nothing more to do with them. There may be difficulty in stating the theoretical condition of the title to the real estate resulting from this arrangement. It is not necessary to formulate an accurate definition. Practical problems are suggested as likely to result from the fact that the record title remains in the plaintiff, but their solution need not be undertaken until they arise. The existence of security for the judgment does not prevent an action upon it. If the defendant owned real estate in the county where it was rendered the result would be a lien which would be released upon its payment, but this would not preclude its collection by proceedings elsewhere. It is by its terms payable at all events; it is collectible upon execution; and it is capable of supporting a new action in another state.

We think that upon the death of the plaintiff in the action brought in Kansas a revivor was properly had in the name of the executrix. The original decree, like other personal judgments for the payment of money, is to be regarded in two aspects: as a conclusive determination of the fact of the indebtedness, and as a basis for its collection by execution. In the later aspect, the ancillary

administrator appointed in Missouri may have been its legal
95 owner, and the person entitled to its control. But the action brought upon it in McLain's lifetime was essentially one to recover upon the original claim, the judgment being invoked as a conclusive determination of its validity. The right to the maintenance of the action already brought passed to the executrix. She was entitled to receive the proceeds of the judgment, even if it should be collected by the Missouri administrator, subject to the claims of any creditors in that state. (18 Cyc. 1235.) The defendant is not exposed to any greater risk of unnecessary annoyance than if the judgment in Kansas and that in Missouri stood in the name of the same individual. He will of course in either case be protected against liability for a double satisfaction. No possible unfairness or injustice can result to him from this feature of the proceedings. Moreover the defendant explicitly consented to the revivor in the name of the executrix and in view of that fact can not be heard to question her capacity to maintain the action.

The defendant maintains that the judgment in the Missouri circuit court, not having been revived within a year after the death of the plaintiff, has become a nullity for all purposes. In Kansas a revivor is necessary to preserve the vitality of a judgment upon the death of the plaintiff, and can only be made within a year. (Mawhinney v. Doane, 40 Kan. 681, 20 Pac. 488.) The law of Missouri appears to be otherwise (23 Cyc. 1439; Simmons v. Heman, 17 Mo. App. 444), although evidence to that effect was not introduced. But even assuming that the Missouri judgment has lost its vitality by reason of the failure to revive it within a year from the appointment of an administrator in that state, it is still evidence of the validity of the claim on which it is based. (Douglass v. Loftus, Adm'x, 85 Kan. 720, 119 Pac. 74.) The judgment was in full force when the action was begun in Kansas upon it; this action was revived in due time after the death of the plaintiff, and the right of recovery was preserved, even although during its pendency the right to issue execution upon the original judgment was permanently lost. The principle is similar to that applied in the case last cited and in Kothman v. Skaggs, 29 Kan. 5, and Steffins v. Gurney, 61 Kan. 292, 59 Pac. 725.

96 The defendant maintains that the existence of the judgment against him was not sufficiently proved because the transcript introduced in evidence included only a copy of the judgment itself, and not of the pleadings or other proceedings. The purpose being only to establish the fact of the judgment, this was sufficient. (23 Cyc. 1574; 13 A. & E. Encycl. of L. 1045-1046.) The decree however contained recitals showing in considerable detail the character of the action in which it was rendered.

It appears that while the action upon the Missouri judgment was revived in the name of the executrix on May 6, 1907, the petition was not amended so as to set out her appointment and qualification until January 4, 1911. The defendant urges that the statute of limitations was not interrupted by the order of revivor, that no action was pending in behalf of the executrix until the amendment of the petition, and that in the meantime the statute of limitations had

run. Where a plaintiff dies and the action is revived in the name of a successor the petition should be amended so as to allege the interest of the new party in issuable form (C. B. U. P. Rld. Co. v. Andrews, Adm'r, 34 Kan. 563, 9 Pac. 213), but the mere order of revivor is sufficient to prevent the running of the statute. (Railroad Co. v. Menager, 59 Kan. 687, 54 Pac. 1043.)

The judgment is reversed and the cause remanded with directions to render judgment for the plaintiff.

All the Justices concurring.

A true copy.

Attest:

CLERK SUPREME COURT.

97 And afterwards, on the 22nd day of February, 1913, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, Petition for a Re-hearing of this cause, which Petition for Re-hearing is in words and figures as follows, to-wit:

98 Filed Feb. 22, 1913. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of Kansas.

Number 17930.

JULIA A. MCLAIN, as Executrix of the Estate of Carey McLain, Deceased,
vs.
M. V. B. PARKER, Appellee.

Petition for Re-hearing.

I. O. Pickering, attorney for appellee.

99 In the Supreme Court of Kansas.

Number 17930.

JULIA A. MCLAIN, as Executrix of the Estate of Carey McLain, Deceased,
vs.
M. V. B. PARKER, Appellee.

Petition for Re-hearing.

The appellee, M. V. B. Parker, respectfully shows to the court that he is aggrieved by the decision in this case, reversing the decision and judgment of the trial court and directing judgment for the plaintiff, and said appellee files herein his petition for a re-hearing and re-argument of said case to the end that the court may be fully advised and that justice may be done in said cause.

We would respectfully submit that the decision of this court as announced in the syllabus and opinion is manifestly made upon a misunderstanding of the facts; that it overlooks and ignores well settled principles of law and equity, reverses the administra-
100 tion of the law applicable to this case; refuses to recognize the authority of adjudicated cases by this and other courts of last resort; changes the construction and application of the statutes of this state as heretofore construed and applied by this court with such uniformity and for such length of time that the same have become rules of conduct and of property. These statutes and decisions were, many of them, cited in our brief and printed argument but were overlooked and not considered by the court in its decision.

"Action" and "Cause of Action."

The court, in its decision, does not seem to distinguish between an "action" and a "cause of action." A civil action may be commenced simply by filing a petition and causing a summons to issue thereon to the defendant. Code Sec. 58. This distinction between an "action" and a "cause of action" is the foundation of appellee's defense and, we think, determines adversely to the appellant, her right to maintain this action.

On May 6th, 1906, Carey McLain commenced a civil action against M. V. B. Parker, in the district court of Johnson County by filing his petition and causing a summons to issue thereon to the defendant. The "action" was thereafter pending which did not abate by the death of the plaintiff. Code Sec. 39.

"In case of the death or other disability of a party the court or judge may allow the 'action' to continue by or against his representative or successor in interest."

101 After commencing the action and before any answer was filed to the petition or issue made thereon, McLain died. Application was made by counsel representing Julia A. McLain to revive the "action" in her name as executrix of the estate of Carey McLain, in Kansas. The defendant did not ask that a revivor be had in her name. The order of revivor would have been made by the court with or without the consent of the defendant. The "consent" of the defendant only waived the service of notice of revivor of the action. Code Sec. 426. It was no more than a voluntary appearance in court without summons. The defendant does not question the fact that the order of revivor of the action was made by the court or that he consented that the order of revivor should be made. He simply waived notice of the application to revive and conceded nothing further.

The order of revivor being made the executrix could not claim that she occupied any different or stronger position than the original plaintiff, Carey McLain. After the order was made there was at most a civil "action" pending exactly as before. No issue had been made on the original petition filed by Carey McLain, by demurrer or answer before the death of Carey McLain. Had he lived could the defendant, if the facts had warranted, show that he was not the

real party in interest? Code Sec. 25. Did the waiver of notice and consent to the revivor in the name of the appellant, concede that she was the real party in interest who could prosecute this action?

Could Carey McLain had he lived and defendant had waived
102 service of summons, and the defendant had thereafter shown that he was not the real party in interest, have answered that defendant was estopped to raise such a question because he had made a voluntary appearance as defendant in the action?

Is it a sufficient answer to defendant's plea that appellant has no legal capacity to sue or to prosecute this action, to say that because defendant consented to the revivor of the action in her name as executrix that he is precluded from showing that she is not the real party in interest and has no right to prosecute the action? Did the defendant's consent that the action might, on appellant's application, be revived, amount to a consent that she was entitled to judgment and deprive him of every defense? Did the revivor of the action in her name determine in any manner that she was the real party in interest who could prosecute the action to judgment?

This court, in effect, we think, without due consideration decides that such was the effect of defendant's consent. This cannot be the law. If Carey McLain had lived, defendant could have made the same defense in his answer if the petition did not show it on its face, for example, that before he brought the action he had sold and disposed of his alleged "cause of action," or any other fact or facts that would preclude his prosecution of the case under Sec. 25 of the code. How can it be said that by the mere revivor of the action the appellant acquired a superior position to that of the original

plaintiff? If it be conceded, as we think it must, that the
103 order of revivor of the action simply gave the appellant standing as a party to the action and nothing more, then, we wish to call the attention of the court to the

Cause of Action

and the effect of the death before issue joined and before judgment on the original petition, of the plaintiff, Carey McLain. If, at the time of the commencement of the action, Carey McLain was the owner of the cause of action pleaded in his petition and he stated a good cause of action therein, no question could arise that he was the real party in interest, and could prosecute the action to judgment. And if the cause of action set forth in his petition had been upon a "simple contract debt," there would be no question that the action could be prosecuted by his executrix appointed by the probate court in this state where the defendant resided and was sued.

But the cause of action as set out in the petition was not upon a "simple contract debt," but upon "a specialty," a judgment of a court of another state and according to all the authorities did not follow the debtor into the state of his residence and into another jurisdiction.

Carey McLain died in January, 1907. The order of revivor of the action was not made until May, 1907. Long before this order of

revivor, and in January, 1907, the appellant had been appointed by the probate court of Franklin County, Kansas, executrix of the estate of Carey McLain, deceased, in Kansas, and H. C. McLain had been appointed as administrator of the estate of Carey
104 McLain, deceased, by the Probate Court of Jackson County, Missouri, had duly qualified as such and had before any order of revivor of said action was made by the district court of Johnson County, made out and returned and filed in the probate court of Jackson County, Missouri, his sworn inventory of the estate of Carey McLain in Missouri, and this inventory included the identical judgment of the circuit court of Jackson County, Missouri, which Carey McLain, in his lifetime had sued upon as a "cause of action." See appellee's abstract, p. 21.

When the order of revivor of this action was made, May 6th, 1907, the appellant had been appointed as executrix of the estate in Kansas and taken possession of such estate in this jurisdiction and the same was then in course of administration since January, 1907. And when said order of revivor of said action was made H. C. McLain had been the duly appointed, qualified and acting administrator of the estate of Carey McLain, deceased, in Missouri, since February 6, 1907, and said estate was open and in course of administration, and the administrator appointed by the Probate Court of Jackson County, Missouri, had actually taken possession of this identical judgment as a part of the estate of his decedent and returned the same in his sworn inventory. This judgment was rendered by the Circuit Court of Jackson County, Missouri; it was a specialty, and had its *situs*, in the place where it was rendered and remained of record. It was not a simple contract debt and did not follow the debtor to another jurisdiction. It was an
105 asset in the hands of the administrator appointed in the same jurisdiction where it was rendered. The administrator in Missouri had the absolute right to the estate and property of every kind which came into his hands including this judgment, and was bound to account for said estate under his oath and bond for the payment of the debts of his decedent in Missouri, and the costs of administration. The domiciliary executrix in Kansas, had no interest in the estate of Carey McLain in Missouri, except what might remain on final settlement of his accounts with the Probate Court of Jackson County, Missouri.

There was no privity between the administrator in Kansas and the administrator in Missouri.

The rights of the administrator in Kansas and the administrator in Missouri with respect to the estate and property which came into their hands belonging to their decedent, were fixed and certain three months before the order of revivor*s* of this action was made. Such order could not change their status. With respect to that part of the estate which had rightfully come into the hands of each for administration, said administrators held independently, and, until the final close of the ancillary administrators' trust adversely to each other. There was absolutely no privity between them, and the fact that the respective administrations were of parts of the same

estate, but in different states or jurisdictions made no difference.

106 The laws of Kansas and Missouri especially provide for the prosecution of suits in this state by administrators appointed in other states. See Civil Code, Sec. 47:

"Whenever a cause of action has accrued under and by virtue of the laws of any other state or territory, such cause of action may be sued upon in any of the courts of this state by the person or persons who are authorized to bring and maintain an action thereon in the state or territory where the same arose."

See also par. 3639 Gen'l Stats. 1909, being Sec. 203, Ch. 38 Executors and administrators, as follows:

"An executor or administrator duly appointed in any other state or country may sue or be sued in any court in this state, in his capacity as executor or administrator, in like manner and under like restrictions as a non-resident may sue and be sued."

Upon the death of Carey McLain after the commencement of his action against the defendant, his sole "cause of action" being a judgment of the Circuit Court of Jackson County, Missouri, as a necessary and inevitable effect of such death two things affecting the prosecution of the action occurred:

First. The action itself became dormant.

Second. The "cause of action" also became dormant.

That an action cannot proceed after the death of a sole plaintiff or defendant until it is revived, requires no argument or the citation of any authorities.

107 That a judgment dormant because of the death of the judgment creditor cannot serve as a cause of action until the judgment is revived, see:

Manley v. Meyer, 68 Kan. 378.
Seeley v. Johnson, 61 Kan. 337.
Mawhinney v. Doane, 40 Kan. 676-680.
Scruggs v. Tutt, 23 Kan. 181.

Sec. 428 Code 1909 provides how a dormant judgment may be revived. In the case of Mawhinney v. Doane, supra, this court says:

"An action cannot be maintained on a dormant domestic judgment or a revivor of the same had, when more than three years have elapsed from the death of the judgment creditor, and the appointment of an administrator of the estate of the Judgment Creditor."

In Seeley v. Johnson, 61 Kan. 337 this court says:

"A sale of real estate made under a special execution issued after the death of the plaintiff in the decree, without a revivor of the judgment, is void."

In Manley v. Meyer, supra, 68 Kan. p. 396, it is said:

"Whatever may be the rule elsewhere, in Kansas the death of a party renders a judgment dormant within the meaning of the statute."

And in Mawhinney v. Doane, supra, the court say:

"The judgment sued on is dormant, and the time has expired

within which it can be revived. This dormancy was created by the death of Sarah F. Mawhinney."

108 No motion or application of any kind was ever made after the death of Carey McLain for the revivor of the judgment which was sued upon as the cause of action in this case, and no order reviving said judgment was ever made.

See appellant's brief p. 3, where it is stated that,

"On the 15th day of April, 1907, Julia A. McLain, as executrix of the estate of Carey McLain, filed a motion to revive the case (action) of Carey McLain v. M. V. B. Parker. * * * On the 6th day of May, 1907, defendant, in open court, agreed to the revivor of the action in the name of Julia A. McLain, executrix, and an order so reviving the action was made by the District Court of Johnson County, Kansas."

It has never been claimed by the appellant, at any stage of the proceedings of this case, that the judgment sued on was ever revived, or that any application was ever made for such revivor.

After the death of Carey McLain no execution could issue out of the Circuit Court of Jackson County, Missouri, upon his judgment against the defendant, until said judgment was revived, and if such execution should issue, without such revivor, it would be absolutely void.

Said judgment was equally void before such revivor as a cause of action.

No Privity.

There is no conflict of evidence in this case, and if there was

109 such conflict the decision of the court below upon the point decided in favor of the defendant would be conclusive in this court. A restatement of admitted facts for the purpose of presenting the point of "no privity" between the administrator in Kansas and the administrator in Missouri follows:

First. Carey McLain commenced this action in his lifetime.

Second. His cause of action was a judgment in a court of another state.

Third. After commencing the action plaintiff died.

Fourth. Immediately on plaintiff's death, said judgment became dormant.

Fifth. Plaintiff left an estate in Kansas and also in Missouri.

Sixth. Deceased resided in Kansas; he died Jan'y 19, 1907.

Seventh. In Jan'y, 1907, administrators were duly appointed in both Kansas and Missouri, and each immediately qualified and took possession of the estate belonging to their decedent in their respective states.

Eighth. No order of revivor of said action was made until May 6, 1907.

Ninth. The administrator in Missouri had then taken into his possession and included in his inventory of the property of Carey McLain in that state to be administered by him, the same judgment sued upon by Carey McLain, as one of the assets of said estate in Missouri.

Tenth. The order of revivor of said action was made upon the motion of the appellant as executrix in Kansas.

110 Eleventh. No application was ever made for the revivor of said judgment sued on herein and no such order was ever made.

Twelfth. No final settlement of the estate of Carey McLain has been made either in Kansas or Missouri and both administrators are still acting and in the performance of their trust.

Thirteenth. There is no evidence in the record as to the amount or extent of the indebtedness of Carey McLain or the cost of administration of his estate *on* Missouri.

Upon the death of Carey McLain after the commencement of the action on the judgment, and the appointment of administrators of his estate in Kansas and Missouri, title to said judgment passed at that time, either to the executrix in Kansas, or the administrator in Missouri. Every authority cited by us in our brief, and we confidently assert, there are none to the contrary, hold that the title to a judgment which is a specialty and has a situs vests in the administrator appointed in the jurisdiction where the judgment is rendered and remains of record.

We refer the court to the authorities upon this point cited in our brief. We think there can be no question, under the admitted facts in this case, and the law, that upon the appointment and qualification of H. C. McLain, as administrator of the estate of Carey McLain in Jackson County, Missouri, that the title to this judgment

111 passed to him and to no one else. If this be so we ask, when and by what means such title was devested? Did the revivor of the action, commenced by Carey McLain in his life time, said revivor being several months after the appointment of the administrator in Missouri, and after he had actually taken possession of this judgment, and charged himself with it, in his sworn inventory, as one of the assets of the estate of Carey McLain in Missouri, to be administered by him, such revivor being in the name of the representative of Carey McLain in Kansas, did said revivor have the effect to devest the title to said judgment from the former owner of the same? It seems to us that to ask such a question is to answer it, that it did not.

It will not be claimed that after the appointment and qualification of Julia A. McLain as executrix of the estate of Carey McLain in Kansas, by the Probate Court of Franklin County, Kansas, and the appointment and qualification of H. C. McLain, as administrator of the estate of Carey McLain in Missouri, that each were not "representatives" of the same decedent.

Sec. 428 of Civil Code, 1909 relating to revivor of judgments, and of actions in case of the death of the plaintiff in an action or judgment creditor, is as follows:

"Upon the death of the plaintiff in an action, it may be revived in the names of his representative, to whom his right has passed."

Where there is more than one representative, and they are in dif-

ferent jurisdictions, between whom there is no privity, a re-
112 vivor of the action must necessarily be in the name of that representative to whom the right of the deceased plaintiff had passed.

We respectfully submit that this court is not authorized to eliminate or disregard the words "to whom his right had passed." We understand the rule of construction universally followed, is to give effect to every word of a statute, and that the court must assume that the legislature intended that every part of the statute should have effect.

The question then is to whom or, to what representative of Carey McLain his right to said judgment passed upon his decease? It must be bourne in mind, at all times that this "right" was to a judgment of a court of record in another state, upon which the judgment creditor, Carey McLain had, in his life time commenced an action in the courts of this state. This judgment had a situs in the State of Missouri where an administrator had been duly appointed and qualified and, as stated, had taken possession of and charged himself with this judgment as an asset of the estate of his decedent in his hands.

Counsel for appellant admits that the judgment sued on in this case under the authorities, and as a general proposition, has a situs at the place where it is rendered. See Appellant's brief, p. 16 where he says:

"As a general proposition the situs of a judgment is where a judgment is rendered."

Only one case is cited as sanction for a contrary doctrine,
113 that of Swaney v. Scott, 9 Hump. (Tenn.), 327, which was made under a peculiar statute of Tennessee as pointed out in our brief. We also called the attention of the court, on page 10 of our brief, to the recent case of Rld. Co. v. Herb, 125 Tenn. 417, where the court gives the reason for the enactment of the statute in these words:

"Our statutes were enacted to provide for the administration of the estate of non-resident defendants found in this state, because the personal representative appointed in the state where the decedent resided at his death, had no authority here."

That is not the case in Kansas as we have an express statute providing that administrators appointed in another state, may sue and be sued here exactly as non-residents may sue and be sued, and in their capacity as administrator.

Executors' and Administrators' Act, Sec. 203.

In Woerner's American Law of Administration, Vol. 2, page 650, Sec. 309, it is said:

"Debts due by simple contract are said to follow the debtor, and are deemed to be the property of the deceased where the debtor resides at the time of the creditor's death. * * *

Debts due by specialty however, are held to be the property of the deceased where the securities are at the time of his death. So judgment debts are held to be assets in the jurisdiction where the judgments are recorded."

114 In Slocum v. Sanford, 2 Conn. 533, the court says:

"With respect to the questions of probate jurisdiction, the cases establish this distinction that debts by specialty, or judgment, have a temporary locality; but that those due by simple contract have not. The former are regarded as effects only at the place where the securities are found at the death of the creditor. The latter follow the person of the debtor, and are considered as effects in that jurisdiction in which the debtor is at that time domiciled. * * * The reason for the distinction probably is, that as specialties and judgments, from the solemnity which the law attaches to them, constitute or create, the right of action, or interest to be administered, and are themselves things visible, they are to be regarded as specific chattels; but that writings of a less solemn nature, as notes, and other unsealed documents, which are only evidence of parol contracts cannot be so considered, and therefore that the debts of which they are evidence follow the person of the debtor, and are effects at the place of his domicile" (p. 535).

Holcomb v. Phelps, 16 Conn. 127, 135.

In Woerner's American Law of Administration, Vol. 1, p. 359, Sec. 158, it is said:

"It follows from this doctrine that where a person dying leaves property in several different jurisdictions, the legal representatives of such person must derive their authority from each of as many sovereignities as may have jurisdiction over the property so left, because the territorial element of the law, or rather of the sovereignty from which the law emanates, permits no other sovereignty to exercise authority over it, and each therefore must itself create the legal ownership necessary in its devolution (Story Confl. of
115 Laws, Sec. 522), * * * but the administration in each state is wholly independent whether in the hands of the same or of different executors or administrators, in no wise impaired, abridged, or affected by a previous, and a fortiori by a subsequent grant of administration in another state. There is no privity between administrators in different states. * * *

The administration granted in the state of the domicile of the decedent, is the principal, primary, original, or chief administration, because the law of the domicile governs the distribution of the personal property, whether to heirs, distributees or legatees; while that granted in any other country is ancillary or auxiliary. Both are local, however, to the jurisdiction in which they are granted, being limited to the chattels having a particular situs, independent of each other, save that the origin and devolution of the property in each may be the same. It follows from this want of privity that a judgment obtained against one furnishes no cause of action against another, so as to affect assets under the control of the other; and it is immaterial that the judgment was obtained against the administrator of the foreign jurisdiction in person, upon due notice to him, or even upon his voluntary appearance. Nor will a judgment in favor of a foreign administrator against the debtor of his intestate

support an action against the debtor by the administrator in another state."

"Talmage v. Chapel, 16 Mass. 71.

"Upon this principle (the title and ownership of the judgment by the foreign administrator) a foreign executor or administrator may maintain an action on a judgment recovered against the debtor in another state."

Woerner's American Law of Administration, Vol. 1, p. 366, Sec. 162.

116 Julia A. McLain was the sole executrix of the will of Carey McLain, deceased. Appellant's Abs. p. 14, and H. C. McLain, the administrator in Missouri, was not a co-executor, or co-administrator, but was entirely independent of the executrix in Kansas, as stated by the authorities quoted and referred to in our brief. He alone was the owner and held the title to the judgment sued upon by this decedent, and to him alone the right of Carey McLain to such judgment, passed.

Counsel for appellant states in his brief, p. 9, as his first proposition, the following:

"The question here is not, who has title to the Missouri judgment, but the question is, in whose name should the cause of action pending in the District Court of Johnson County, Kansas, have been revived."

This question is answered fully and completely by two sections of our statute, which we have already quoted, viz: Code Sec. 428: "Upon the death of the plaintiff in action it may be revived in the name of his representative, to whom his right has passed."

"Code Sec. 25. "Every action must be prosecuted in the name of the real party in interest."

The appellant, by her appointment as executrix of Carey McLain in Kansas, thereby obtained no title to the judgment sued on by her decedent, in this action. H. C. McLain, by virtue of his appointment and qualification as administrator of the estate of Carey McLain in Jackson County, Missouri, where said judgment was

117 rendered and remained of record, did thereby obtain title to said judgment, and actually charged himself with the same, as an asset of his decedent's estate in Missouri, for which he was accountable as such administrator.

The conclusion is obvious that the appellant, being without title to the subject of the action, or cause of action, could not prosecute the same to judgment, and the decision of the trial court, upon that proposition, that she had no title to the judgment and therefore could not maintain the action, it seems to us, was correct and should be affirmed.

We earnestly request the court, in the light of our petition for rehearing, and of the authorities cited, to carefully examine our brief and argument, and the authorities cited therein. We think there can be no escape from the conclusion, that the order of revivor of said action in the name of the appellant, did not determine her

right to prosecute a cause of action to judgment, of which she had no title, and that such action could only be prosecuted by a party holding the title to said judgment which, in this case, was H. C. McLain, the Missouri, administrator.

Our contention that the appellant had no title to the cause of action sued on in this case; that she was not the real party in interest, and had no right to prosecute said action, is not technical, but is substantial. In the case of Modern Woodmen v. Hester, 66 Kan. 129, Burch, J., speaking for the court, says:

118 3 Sec. of Syl. "The probate court of their domicile has jurisdiction to appoint a guardian for minor children, even though they may not be within the state at the time, and the probate court of another state, where they may be sojourning merely, has no such jurisdiction."

Idem Sec. 5. "A beneficiary certificate issued by a fraternal beneficiary society, suable in Missouri, in favor of minor children domiciled in Missouri, has its legal situs at their domicile, and is an asset in the hands of a guardian appointed there, and the presence of the paper in another state does not authorize the appointment of a guardian for the minors in such other state."

Connell v. Moore, 70 Kan. 88.

In the case of Modern Woodmen & Hester, supra, at page 138 in the opinion, it is stated:

"Under authority of Perry Admr. v. St. J. & W. Rld. Co., 29 Kan. 420, the question of jurisdiction could be investigated in an action on the beneficiary certificate brought by the party claiming the right to sue by virtue of his appointment in Kansas."

The question decided in this case arises upon an appointment by the Probate Court of Douglas County, Kansas, of a guardian of minor children actually present in that county, and the appointment of the mother of said children as their guardian by the Probate Court of Jackson County, Missouri, which was the domicile of the mother.

Suit was brought upon a certificate issued to the deceased father of the children in which said minors were named as beneficiaries, said certificate being in the manual possession of the guardian

119 appointed by the Probate Court in Kansas. It was held by this court that the situs of the cause of action, being said beneficiary certificate, was at the domicile of said children which was that of their mother in Jackson County, Missouri, and that she alone had authority to sue and recover upon such certificate. This case is not distinguishable from the case at bar upon the proposition that the appellant in this case, by her appointment as executrix, obtained no title or right to maintain an action, upon the judgment against the defendant which had its situs in Jackson County, Missouri, where an administrator has been appointed, and was acting, although she might have had the manual possession of a copy of such judgment.

The guardian appointed by the Probate Court of Douglas County, Kansas, also held the manual possession of said beneficiary certificate and brought his action thereon against the defendant company.

It is stated, both in the syllabus and in the opinion in this case, that the action, on the death of Carey McLain, was properly revived in the name of Julia A. McLain as executrix. We respectfully submit and contend that unless this statement is supported by the facts of this case and the law, that it is mere obiter dicta and should not bind the defendant in any manner. Whether or not the action was properly revived in the name of the appellant so as to enable her to prosecute said action to judgment depends upon two considerations, as heretofore pointed out, viz., (1) whether the cause of action sued upon Carey McLain was a "simple contract debt"
120 or a "specialty" or "judgment" of a court in another state in which an administrator or representative of Carey McLain, the judgment creditor, had, before any revivor of said action, been appointed and qualified; (2) whether or not upon the death of the original plaintiff, Carey McLain, the appellant, as one of his representatives took title to "the cause of action."

Suppose that after the rendition of the judgment in the Circuit of Jackson County, Missouri, Carey McLain had died before commencing any action on said judgment in Johnson County, Kansas. Suppose that after his death the appellant was appointed executrix of his estate in Kansas, and at the same time an administrator of his estate in Missouri was appointed by the Probate Court of Jackson County, Missouri, where such judgment was rendered and remained of record. Which of these two representatives of Carey McLain could have commenced and maintained an action in this state against the defendant upon said judgment? There being no privity between the administrator in Kansas and the administrator of the same estate in Missouri, they were the same as strangers, and only that representative who was possessed of the title to the judgment or cause of action could bring and maintain the suit. In other words, in the language of our own Civil Code, Sec. 428: The cause of action could only be revived, or an action upon it maintained in the name of the representative of Carey McLain "to whom his right had passed."

121 We respectfully ask the court to re-examine the authorities cited and referred to in our brief covering the proposition that the title to a judgment is in the representative of the judgment creditor appointed at the place where such judgment is rendered and remains of record, and that as between him and an administrator appointed in another state or jurisdiction, there is absolutely no privity.

Woerner's American Law of Adm., Vol. 1, p. 359, Sec. 158, p. 366, Sec. 162, id. Vol. 2, p. 650, Sec. 309. Story's Conflict of Laws, Sec. 522. Att'y Gen'l v. Bowens, 4 Mees. & W. 171; where it is expressly held that a judgment rendered in favor of a decedent is assets in the hands of his administrator appointed at the place where the judgment was rendered. Freeman on Judg'ts Sec. 217; Manning v. Leighton (Vt.), 24 L. R. A. 684; Lucas v. Adams, 70 Cal. 403, s. c. 59 Am. Rep. 423; Lee v. Burrows, 12 Cal. 188; Biddle v. Wilkins, 1 Pet. 686 (U. S.); Talmage v. Chapel, 16 Mass. 71; Black on Judg'ts, Vol. 2, Sec. 563; McLean v. Meek, 18 How. (U. S.) 16.

In the latter case it is stated:

"It has been held in Massachusetts that, * * * the authority of the executor does not extend to the property there (Vt.), nor to the doings of the administrator, nor does the authority of the administrator extend to the property here (in Mass.), nor to the doings of the executor. They have therefore, not one of the direct
122 relations to each other which enter into the idea of privity. * * * There is no privity between the estate in the hands of the executor, and that in the hands of the administrator, each must be administered separately and independently."

Nul Tiel Record.

The sixth count of defendant's answer denied generally each and every material allegation of plaintiff's petition, and this answer was duly verified. (See Appellee's Abstract, pp. 13, 14). The material allegations of plaintiff's petition were the recovery of a judgment against the defendant in the Circuit Court of Jackson County, Missouri, and the record of such judgment. The defendant, in his answer, denied that there was any such record. This denial cast upon the plaintiff the burden of proving the whole record to show whether or not it justified the findings and decree which, alone, were certified as the record upon which suit was brought in Kansas.

Under the verified denial in plaintiff's answer, the burden was on the plaintiff to produce and prove the whole record.

Civil Code, 1909, Sec. 110.
Caple v. Drew, 70 Kan. 136.
Threshing Mach. Co. v. Peterson, 51 Kan. 713.

Under our code practice a verified general denial is equivalent to the common law issue of nul tiel record.

Bank v. Hamer, 47 Fed. Rep. 36.

123 See also:

Ashley v. Laird, 14 Ind. 222, s. c. 77 Am. Dec. 67.
13 Am. & Eng. Enc. of Law 2nd Ed., p. 1045 note 6.
Bowman v. Ins. Co., 58 Minn. 173.

In the opinion in this case the writer several times refers to matters which it is said were contained in the petition of McLain in the Circuit Court of Jackson County, Missouri. This petition was not introduced or offered in evidence on the trial of the case, and is not in the record, and we are at a loss to know where this court got its information of the contents of said petition. It was the identical object of defendant's plea in his answer of no such record, as claimed, to compel the production of the whole record in that case including the pleadings. This court in deciding the case against the defendant found it necessary to state what the petition contained in order to justify the decree and findings which alone were in evidence. How could this court know anything about what was in issue in the case, without the pleadings, which were demanded by defendant's answer and not produced?

We do not question the rule stated by the court that ordinarily where a judgment of a court of record of another state is sued upon as a cause of action in the courts of this state, a properly certified copy of the final judgment would be sufficient. But we contend, that when the denial of such record is made under oath, as in this case, it is not sufficient, and the burden of proving the whole
124 record, which includes the pleadings in the action, is cast upon the plaintiff, and the prima facie character of the certified copy of the final judgment, no longer exists.

Here there is nothing in evidence except the purported findings and decree of the Circuit Court of Jackson County, Missouri.

The certificate reads as follows:

"STATE OF MISSOURI,
County of Jackson, ss:

I, Harry G. Henley, Clerk of the Circuit Court within and for the county and state aforesaid, do hereby certify that the foregoing is a full, true and complete transcript of the decree and finding in case No. 22682, entitled Carey McLain, plaintiff, against M. V. B. Parker, defendant, as the same now appears in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, done at office in Kansas City, this 23rd day of April, A. D. 1906.

[SEAL.] HARRY G. HENLEY, *Clerk.*"

The defendant, by his certified answer asserted as a defense to plaintiff's cause of action that there was no petition in said action stating any cause of action against the defendant, or which would justify the alleged "decree of finding."

A judgment which is not based upon the issues made by the pleadings in an action, is a nullity and void.

Brenner v. Bigelow, 8 Kan. 497-500.
Newby v. Myers, 44 Kan. 477.

As stated this court could not know whether issues which would justify the purported decree and findings existed or not.
125 May this court, when defendant has demanded the production of the pleadings and whole record, assume without proof that such issues were in the case, and decide in favor of the plaintiff and against the defendant?

In this case the court states in its opinion as follows:

"In each instance the plaintiff asked to have the court annul on account of fraud, a contract which he had made with the defendant for the purchase of real estate, two tracts being situated in Missouri (but not in the county where the action was brought), and the rest in Arkansas or New Mexico."

The above refers to the petition of Carey McLain against the defendant, M. V. B. Parker, filed in the Circuit Court of Jackson County, Missouri, and upon which the alleged decree and finding, which is attempted to be used as a cause of action in this case in the courts of Kansas, was rendered. As that petition was neither in-

troduced nor offered in evidence in this case, a statement of its contents by this court suggests the inquiry, how did the court know the contents thereof? The facts are that Carey McLain did not in any one of his several separate causes of action against the defendant in Jackson County, Missouri, claim that he had ever purchased any part of the land or property in a single instance from the defendant. In every case land was purchased from third parties, the titles being transferred directly from said third parties to said McLain and Parker, who were in every instance tenants in common, and
126 there was no contract sought to be annulled for the purchase of any of said property between McLain and Parker, but on the contrary, McLain claimed title by virtue of the conveyances from the common grantors of himself and Parker, and his offer was to convey to Parker the interest that he had thus received in the several properties as a condition precedent to his claim for the recovery of damages against Parker.

So far from seeking to annul any contract between himself and the various grantors by which he was vested with the title to said lands and properties, he confirmed each and every one of said contracts and conveyances, and by his offer to convey the same to the defendant, Parker, sought the aid of the court to compel another contract between himself and Parker by which he would compel Parker to purchase from him properties and interests therein which he, Parker, never owned, and never agreed to purchase from McLain or anyone else.

The court, in its opinion in this case, further says:

"As a condition to recovery upon each transaction the court required the plaintiff to execute and deposit with the clerk a deed to the property involved, naming the defendant as grantee. The plaintiff complied with this condition before the judgment was rendered. He was given an absolute and unconditional judgment for the recovery of a specific sum of money upon each count, but the decision included a provision that upon the satisfaction of each item of such judgment, the corresponding deed should be delivered to the defendant."

127 The above statement of this court is correct, and is justified by the finding and decree, a part of the alleged record which was in evidence in this case. This court states correctly that the plaintiff, Carey McLain, was required by the court to deposit said deeds before the rendition of said judgment against the defendant and as a condition upon which said judgment should be rendered. It was a condition precedent and required the performance of an act by Carey McLain the plaintiff, as a condition for which the judgment for money against the defendant should be rendered and without which no judgment could have been rendered against the defendant for any amount.

The question is not whether or not the judgment against the defendant would support an execution against the property of the defendant in Jackson County, Missouri, but the question is in this case whether or not Carey McLain, in his life time, could sue upon a part of said judgment in this state, which was in his favor, and

ignore that part which required him to make certain conveyances to the defendant as the condition precedent entitling him to any judgment whatever against the defendant. Carey McLain brought this action in his life time, and within a few days after its rendition in Jackson County, Missouri, he made no profert to perform the same conditions here, which were required of him as a condition before he was entitled to recover any judgment whatever in Jackson County, Missouri.

If Carey McLain brought his action here upon the decree
128 of the Circuit Court of Jackson County, Missouri, how can he ask to recover against the defendant the money which was awarded to him in that court upon condition that he first deposit certain deeds, when he has not deposited, or offered to deposit the same deeds here?

Is it giving "full faith and credit to the judicial acts" of the Circuit Court of Jackson County, Missouri, when a suit is brought by the judgment creditor in the courts of this state, upon such judgment, so that the plaintiff is entitled to judgment against the defendant, without performing or tendering performance of conditions precedent without which the Missouri Court would not have rendered the judgment?

The questions last above discussed are specifically raised in defendant's answer in this action. See third count of defendant's answer, appellee's abstract, 9, 10, 11. We ask the court to read this answer and particularly the third count thereof, upon this proposition, and that of nul tiel record, herein discussed.

Both McLain and Parker were residents of Kansas, and had been such residents for many years prior to the commencement of the action in the Circuit Court of Jackson County, Missouri, by McLain against Parker. The latter claimed that he was deceived and misled by McLain and his attorney, and was induced thereby to go to Kansas City, Missouri, where McLain had temporarily resided, and was there served with summons. Parker testified, and it is not denied that McLain and his attorney told Parker and his attorney, that the action would be
129 brought at Parker's home in Kansas. Parker did not fear the result of any such suit brought against him at his home where he was known. McLain had lived temporarily for some years before the action was brought, in Kansas City, Missouri, and had there hired a Missouri lawyer to work up the case against Parker. The result was the alleged judgment against Parker by a strange, if not an unfriendly court. Even that court required McLain as a condition, upon which he should recover any judgment against Parker to execute and deposit certain deeds. This McLain was compelled to comply with. After recovering the judgment McLain brings that judgment to Parker's home, where he had falsely pretended that he would bring the first action, and without making profert of the deeds, or offering to perform the conditions, required by the Missouri Court, sued Parker upon the money judgment alone, and attempts thereby to relieve himself of the conditions imposed, and at the same time to prevent Parker from contesting the facts, and proving the falsity of the alleged facts upon

which the decree of the Missouri Court was rendered. In other words, he invokes the full faith and credit, act, sues upon that part of the decree which is for money only and closes the door to the admission of any testimony on the part of the defendant which would defeat the original cause of action. In this action the defendant is not allowed to relitigate the facts or alleged facts, which culminated in the Missouri judgment. The actions of McLain and his attorney in declaring their intention of bringing the action at Parker's home when they intended to bring the same action
130 in another jurisdiction, obtaining their alleged judgment, and then immediately suing upon a part of the decree at Parker's home, cannot be construed in any other way than a deliberate attempt on the part of McLain and his attorney to try the issues of fraud against Parker in the foreign jurisdiction, and if successful there, to sue upon a money judgment alone, under the full faith and credit act, thereby cutting Parker off from any defense on the original cause of action, and shutting him up to a defense attacking the jurisdiction of the foreign court alone. It shows that McLain dared not to try the issues in the original case against Parker at his home where he was known.

The court admits in this case that the judgment sued on by Carey McLain in this action became dormant upon his death, January 19, 1907. We quote from the opinion as follows:

"The defendant maintains that the judgment in the Missouri Circuit Court, not having been revived within a year after the death of the plaintiff, has become a nullity for all purposes. In Kansas a revivor is necessary to preserve the vitality of a judgment upon the death of the plaintiff, and can only be made within a year. (Mawhinney v. Doane, 40 Kan. 681, 20 Pac. 488.) The law of Missouri appears to be otherwise (23 Cyc. 1439; Simmons v. Heman, 17 Mo. App. 444), although evidence to that effect was not introduced. But even assuming that the Missouri judgment has lost its vitality by reason of the failure to revive it within a year from the appointment of an administrator in that state, it is still evidence of the validity of the claim on which it is based."

131 We respectfully submit that the authorities cited by the writer of the opinion do not sustain the decision of the court upon this point. The cases decided by this court on the effect of a dormant judgment cited by us above and many other cases to the same effect, including the case of Mawhinney v. Doane, 40 Kan. 681, are all to the effect that a dormant judgment is dead for all purposes, until revived in the manner prescribed by statute; that even an execution issued upon such judgment is void, and much more is such a judgment void as a cause of action upon which to recover a valid judgment. Without irreverance, it may be stated that such a feat would be as much of a miracle as the raising of Lazarus from the dead, that is, as we interpret the decision in this case, it would be possible to use a dead judgment, dormant and lifeless, upon which an execution could not issue, and base thereon a living judgment enforcible and good for all purposes.

When this court has decided, as it has many times, that a dormant judgment cannot serve as the basis or cause of action upon

which to predicate another judgment, and it is admitted, as it is in this case, that this judgment was dormant, and became dormant because of the death of Carey McLain, the sole judgment creditor, and that it never has been revived, is it not a practical reversal of all former decisions to say in this case, that such dormant judgment is a good cause of action, and that no revivor is necessary, and that another judgment may be predicated thereon?

132 We do not believe that upon further consideration this court will be ready to announce such a decision.

The disability of dormancy occurred after this action was brought by the death of the judgment creditor, who was also the plaintiff in this action. There is no statute of limitations which operate to produce such dormancy, but it occurs immediately upon the death of the judgment creditor. It, the judgment, if it is sought to use the same as a cause of action, must be revived within two years in order to give it vitality for any purpose. Code Sec. 437. This is a statute of limitations and applies with all its force to the judgment in this action, and was pleaded in the answer of the defendant. (See Appellee's Abstract, p. 14.)

Civil Code 1909, Sec. 24, provides as follows:

"When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense."

In Hogaboom v. Flower, 67 Kan. p. 43, it is said:

"When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense." This provision is broad enough to include all actions, whether legal or equitable. A right of action thus barred is dead for all purposes while the bar continues. Courts cannot revitalize it or give it force; it is as if no such right had ever existed. It is of no importance how or by whom it is brought upon the record; it is no more potent to defeat a recovery, than it is to sustain one."

See also

Donald v. Stybr, 65 Kan., 578.

133 The statement of the court in this case that the judgment was alive when the action was commenced by the judgment creditor Carey McLain; that after his death and the order of revivor of the action in the name of the appellant as his administrator, more than three months after such dormancy occurred, gave her the right to prosecute said action to judgment is, we submit, contrary to the provisions of the Code, and all the former decisions of this court. This statement of the court would be correct if the subject or cause of action, which was commenced by Carey McLain had been upon a "simple contract debt" which had not been barred by any statute of limitations before the commencement of the action, but, as heretofore stated, it was upon a judgment of another state, the title to which had vested in the administrator of the estate of Carey McLain, at the place where said judgment was rendered, and there has never been any revivor of said judgment, at any time or in any place.

We most respectfully, but most earnestly, request the court to read

and consider this, our petition for rehearing, and that upon a consideration thereof our petition may be granted, and the former decision of this court reversed, and the decision of the trial court herein affirmed.

Respectfully submitted,

I. O. PICKERING,
Attorney for Appellee.

Olathe, Kans., Feb. 20, 1913.

134 And afterwards, on the 12th day of April, 1913, the same being one of the regular judicial days of the January, 1913 term of the Supreme Court of the State of Kansas, said court being in session at its court room in the City of Topeka, the following proceeding, among others, was had and remains of record in words and figures, as follows to-wit:

135 In the Supreme Court of the State of Kansas.

SATURDAY, April 12, 1913.

No. 17930.

JULIA A. MCLAIN, as Executrix, etc., Appellant,
vs.
M. V. B. PARKER, Appellee.

Now comes on for decision the petition for a rehearing of this cause; thereupon it is ordered and adjudged that said petition for a rehearing be denied.

136 And also on the same day, to-wit, the 12th day of April, 1913, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the Opinion of the Court upon the Petition for Rehearing, which opinion is in words and figures as follows, to-wit:

137 No. 17930.

JULIA A. MCLAIN, as Executrix of the Estate of Carey McLain, Deceased, Appellant,
v.
M. V. B. PARKER, Appellee.

Appeal from Johnson County.

Rehearing Denied.

Opinion Denying Petition for Rehearing.

The opinion of the court was delivered by MASON, *J.*:

A petition for rehearing has been carefully considered but the court remains of the opinion that the case was rightly decided. Sup-

plementary to the original opinion it may be said that we do not determine that the action in Kansas on the Missouri judgment could not have been revived in the name of the Missouri administrator, nor is the decision based upon the view that technically the title to that judgment was vested in the Kansas executrix rather than in the Missouri administrator. The domiciliary representative however has in a sense a title to all the property of the testator, wherever situated. (18 Cyc. 1228, 1229.) The executrix can not be regarded as a stranger to the action brought by the testator in this state upon the Missouri judgment. A payment to the executrix would be a complete protection to the defendant, and under the circumstances of the case we hold that he can not defeat the action on the ground that the revivor could only have been lawfully had in the name of the foreign representative.

The statements made in the original opinion as to the contents of the petition on which the Missouri judgment was based were derived from the recitals of the judgment—a source which we regard as sufficient for the purpose of indicating the character of the judgment. The statement as to the character of the plaintiff's cause of action was not entirely accurate. It read: "In each instance the plaintiff asked to have the court annul on account of fraud a contract which he had made with the defendant for the
138 purchase of real estate." From the recitals of the judgment it in fact appears that in most instances what the plaintiff charged was, not that the defendant sold him property directly, but that he induced him to join in buying property from others, overstating the price, and defrauding him of the difference. In these instances the court annulled the contract between the plaintiff and the defendant, giving the plaintiff judgment for the amount he had paid, and requiring him to deed his interest in the property to the defendant. The correction is made for the sake of accuracy, but is not thought to affect the legal question involved.

We realize that the defendant is exposed to an apparent hardship by the Kansas court undertaking to enforce the foreign judgment, inasmuch as it has no power to compel the delivery of the deeds deposited with the clerk of the Missouri court for his benefit. We remain of the opinion however that inasmuch as the judgment by its terms is payable without condition, the plaintiff is entitled to sue upon it in this state, where its justice or injustice is not a matter of inquiry. If collection is made here it must be presumed that the defendant upon showing that fact to the Missouri court can obtain his deeds, just as he might do if the judgment had been satisfied in any other manner, and just as he might procure a discharge of any judgment against him, the amount of which had been collected by suit thereon in another state.

A true copy.
Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

139 *Authentication of Record.*

SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, Clerk of said Court, do hereby certify that the foregoing pages numbered from 1 to — inclusive, are a true, full and complete transcript of the record and proceedings in the case of Julia A. McClain, Executrix of the Estate of Carey McClain, deceased, Plaintiff-appellant, vs. M. V. B. Parker, Defendant-Appellee, and also of the opinion of the Court rendered therein being the original opinion and the opinion denying a re-hearing upon the petition of said defendant as the same now appear on file in my office.

In Testimony Whereof, I have hereunto set my hand — affixed the seal of said court at my office in Topeka, Kansas, this 3d day of July 1913.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

140 Here follows, the original petition for a writ of error, Prayer for Reversal, and Assignments of error, the Original Writ of Error, a copy of the Bond for appeal and Supersedeas, and the original Citation together with proof of service of the same, and a copy of the Journal Entry allowing the Writ of error.

141 Supreme Court of Kansas.

No. 17930.

JULIA A. MCLAIN, Executrix of the Estate of Carey McClain, Deceased, Plaintiff-Appellant,
vs.
M. V. B. PARKER, Defendant-Appellee.

Petition for Writ of Error.

Considering himself aggrieved by the final decision of the Supreme Court in rendering judgment against him in the above entitled case, the defendant-appellee hereby prays a write of error from the said decision and judgement to the United States Supreme Court and an order fixing the amount of a cost bond.

Assignment of errors herewith:

ISAAC O. PICKERING,
EDWARD P. GARNETT,
Attorneys for Defendant-Appellee.

STATE OF KANSAS,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by M. V. B. Parker, defendant, to Julia A. McLain, executrix of the estate of Carey McClain, deceased, in the sum of $500.00; such bond when approved to act as a supersedeas in the matter of costs.
Dated June 24th, 1913.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

[Endorsed:] 17930. Petition for a Writ of Error. Allowed 6-24-13. Bond 500.00. J. C. J. Filed Jun- 24, 1913. D. A. Valentine, Clerk Supreme Court.

142 In the Supreme Court of the State of Kansas, Tuesday, June 24, 1913.

No. 17930.

JULIA A. MCLAIN, Executrix, etc., Appellant,
vs.
M. V. B. PARKER, Appellee.

And now on this 24th day of June, 1913, comes I. O. Pickering, attorney for the appellee, and presents to the Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, his petition for the allowance of a writ of error herein for the purpose of perfecting an appeal in this case to the United States Supreme Court, and for an order superseding the judgment; and thereupon after due consideration it is ordered that said petition for writ of error be allowed, and it is further ordered that the judgment of this court be superseded and all proceedings thereunder be stayed upon the giving by the appealing party of a bond in the sum of $500.00, to be approved by this court or one of the justices thereof.

143 Supreme Court of Kansas.

No. 17930.

JULIA A. MCLAIN, Executrix of the Estate of Carey McClain, Deceased, Plaintiff-Appellant,
vs.
M. V. B. PARKER, Defendant-Appellee.

Petition for Writ of Error, Assignment, and Prayer.

Considering himself aggrieved by the final decision of the Supreme Court in rendering judgement against *it* in the above entitled case, the defendant hereby prays a writ of *effor*, from the said de-

cision and judgement, to the United States Supreme Court, and an order fixing the amount of a cost bond.

And the said M. V. B. Parker assigns the following errors in the records and proceedings of said cause:

The Supreme Court erred in holding and deciding that the plaintiff-appellant as executrix of the estate of Carey McClain, deceased, could maintain this action against the defendant-appellee in the Courts of Kansas upon the certified copy of the decree in equity rendered by the Circuit Court of Jackson County, Missouri, in favor of the said Carey McClain and against this defendant being a decree in equity which required by its terms the performance of conditions by the plaintiff Carey McClain, towit: the execution of certain deeds to real estate as a condition precedent to the rendition of any judgement in his favor against the said M. V. B. Parker and which said decree imposed upon the plaintiff and defendant reciprocal obligations and which said decree was not for money only,

144 said action being brought in the State of Kansas upon said decree in equity of the Circuit Court of Jackson County, Missouri, and judgement rendered against this defendant for the amount of money specified in the judgement in the Circuit Court of Jackson County, Missouri, with interest and costs, without the execution and delivery and without offer to execute and deliver to the defendant in this state such deeds, or to perform any of the conditions precedent required of plaintiff's decedent as a condition upon which said decree was rendered in his favor and against this defendant in the Courts of Missouri.

Said action being brought and prosecuted against this defendant upon said decree in equity and said final judgement rendered against him by envoking as authority therefor Section 1 of Article 4 of the Constitution of the United States providing that: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which said acts, records and proceedings shall be proved, and the effect thereof."

The application and controlling effect of said section 1 of Article 4 of the Constitution of the United States was envoked by the said plaintiff as conclusive of his rights to obtain another judgement against said defendant in the Courts in this State upon said decree in equity of the Circuit Court of Jackson County, Missouri, without further proof than that of a certified copy of the findings and decree and no other proof was offered in said cause. That said defendant plead in his answer that this Court was without jurisdiction to render any judgement upon said decree in equity because it was a decree rendered in the Courts of another state and did not purport on its face to be, and was not in fact, a decree for money only and that the judgement rendered against the defendant in said cause was and is repugnant to said Section 1 of Article 4 of the Constitution of the United States.

The said errors are more particularly set forth as follows:

The Supreme Court of Kansas erred in holding and deciding,

First. That the plaintiff-appellant had the right and could
145 maintain this action against the defendant, M. V. B. Parker, under the provisions of said Section 1 Article 4 of the Constitution of the United States upon a decree in equity of a sister state which upon its face showed that it was not for money only, but which imposed conditions upon the plaintiff of which performance was not offered or made by said plaintiff in the Courts of this state.

Second. The rendition of said judgement against the defendant is repugnant to Article 14, Section 1 of the Constitution of the United States which provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of a citizen of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

In this, towit: That said judgment deprives said defendant, who is a citizen of the United States, of his property without due process of law and denies to him the equal protection of the law.

Third. That said Judgement is the denail of defendant's rights, privileges and immunities as a citizen of the United States, in that the Constitution and Laws of the United States guarantees to said defendant as a citizen of Kansas, immunity from prosecution upon a decree in equity of another state which on its face and by its terms requires the performance of precedent acts on the part of the plaintiff to the recovery of any judgement in his favor, said acts being the execution of deeds to real estate, without offering in this jurisdiction where he is seeking another judgement against the defendant, to perform the same precedent conditions which he was required to perform by the Court of Missouri by which alone, he was enabled to obtain any judgement against the defendant.

146 Fourth. The Supreme Court erred in rendering a judgement against the defendant upon a certified copy of the findings and decree in equity of the Circuit Court of Jackson County, Missouri, without the production and proof of the entire record; the defendant having plead in his answer nul tiel record and said plaintiff failing and refusing to produce in evidence any of the pleadings or other part of said record of said suit.

Fifth. The Supreme Court of the State of Kansas and the trial Court erred in rendering any judgement against the defendant in this case in favor of the plaintiff-appellant for the reason that said plaintiff had no legal capacity to sue and to maintain said action against the defendant.

For which errors the defendant, M. V. B. Parker, prays that said judgement of the Supreme Coust of the State of Kansas dated February — 1913, be reversed and a judgement rendered in favor of the defendant for his costs.

ISAAC O. PICKERING,
EDWARD P. GARNETT,
Att'ys for M. V. B. Parker.

STATE OF KANSAS,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by M. V. B. Parker to Julia A. McClain, Executrix of the estate of Carey McClain, deceased, in the sum of $500.00; such bond when approved to act as a bond for costs herein.

Dated June 24, 1913.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

[Endorsed:] 17930. Petition for Writ of Error. Assignment and Prayer. Filed June 24, 1913. D. A. Valentine, Clerk Supreme Court.

147 Supreme Court of Kansas.

No. 17930.

JULIA A. MCCLAIN, Executrix of the Estate of Carey McClain, Deceased, Plaintiff-Appellant,
vs.
M. V. B. PARKER, Defendant-Appellee.

Assignment and Prayer.

Now comes the above named defendant and files herewith his petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment:

The Supreme Court of Kansas erred in holding and deciding that the plaintiff-appellant as executrix of the estate of Carey McClain, deceased, could maintain this action against the defendant-appellee in the Courts of Kansas upon a certified copy of a decree in equity rendered by the Circuit Court of Jackson County, Missouri, in favor of the said Carey McClain and against this defendant, being a decree in equity which required by its terms the performance of conditions by the plaintiff, Carey McClain, to-wit: the execution of certain deeds to real estate as a condition precedent to the rendition of any judgement in his favor against the said M. V. B. Parker and which said decree imposed upon the plaintiff and defendant reciprocal obligations, and which said decree was not for money only, said action being brought in the State of Kansas upon said decree in equity of the Circuit Court of Jackson County, Missouri, and judgement rendered against this defendant for the amount of money specified in said judgement in the Circuit Court of Jackson County, Missouri,

148 with interest and costs without the execution and delivery and without offer to execute and deliver to this defendant in this state such deeds or to perform any of the conditions precedent required of plaintiff's decedent as a condition upon which

said decree was rendered in his favor and against this defendant in the Courts of Missouri.

Said action being brought and prosecuted against this defendant upon said decree in equity and said final judgement rendered against him by envoking as authority therefor Section 1 of Article 4 of the Constitution of the United States providing that; "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." "And the Congress may by general laws prescribe the manner in which said acts, records and proceedings shall be proved, and the effect thereof."

The application and controlling effect of said section, Section 1 of Article 4 of the Constitution of the United States, was envoked by the said plaintiff as conclusive of his right to obtain another judgement against said defendant in the Courts of this State upon said decree in equity of the Circuit Court of Jackson County, Missouri, without further proof than that of a certified copy of the findings and decree and no other proof was offered in said cause. That said defendant plead in his answer that this Court was without jurisdiction to render any judgement upon said decree *of* equity because it was a decree rendered in the Courts of another state and did not purport on its face to be, and was not in fact, a decree for money only and that the judgment rendered against this defendant in said cause was and is repugnant to said Section 1 of Article 4 of the Constitution of the United States.

149 The said errors are more particularly set forth as follows: The Supreme Court of Kansas erred in holding and deciding

First. That the plaintiff-appellant had the right and could maintain this action against the defendant, M. V. B. Parker, under the provisions of said Section 1, Article 4 of the Constitution of the United States upon a decree in equity of a sister state which upon its face showed that it was not for money only, but which imposed conditions upon the plaintiff of which performance was not offered or made by said plaintiff in the Courts of this state.

Second. The rendition of said judgment against the defendant is repugnant to Article 14, Section 1, of the Constitution of the United States which provides that; "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

In this, to-wit: that said judgment deprive- said defendant, who is a citizen of the United States, of his property without due process of law and denies to him the equal protection of the law.

Third. That said judgment is a denial of defendant's rights, privileges and immunities as a citizen of the United States in that the Constitution and Laws of the United States guarantee your petitioner as a citizen of Kansas immunity from prosecution upon a decree in equity of another state which on its face and by its terms requires the performance of preceedent acts on the part of the plaintiff to the recovery of any judgment in his favor, said acts being the

execution of deeds to real estate, without offering in this jurisdiction where he is seeking another judgment against the defendant, to perform the same precedent conditions which he was required
150 to perform by the Court of Missouri, by which alone, he was enabled to obtain any judgment against the defendant.

Fourth. The Supreme Court of Kansas erred in rendering a judgment against the defendant upon a certified copy of the findings and decree in equity of the Circuit Court of Jackson County, Missouri, without the production and proof of the entire record the defendant having plead in his answer Nul tiel record, and said plaintiff failing and refusing to produce in evidence any of the pleadings or other parts of said record in said suit.

Fifth. The Supreme Court of the State of Kansas and the trial Court erred in rendering any judgment against the defendant in this case in favor of the plaintiff-appellant for the reason that said plaintiff had no legal capacity to sue and maintain said action against the defendant.

For which errors the defendant, M. V. B. Parker, prays that the said judgment of the Supreme Court of the State of Kansas dated February — 1913, be reversed and a judgment rendered in favor of the defendant for his costs.

ISAAC O. PICKERING,
EDWARD P. GARNETT,
Att'ys for M. V. B. Parker.

[Endorsed:] 17930. Assignment & Prayer. Filed Jun- 24, 1913. D. A. Valentine, Clerk Supreme Court.

151 Supreme Court of Kansas.

No. 17930.

JULIA A. MCCLAIN, Executrix of the Estate of Carey McClain, Deceased, Plaintiff-Appellant,
vs.
M. V. B. PARKER, Defendant-Appellee.

Bond.

Know all men by these presents, That we, M. V. B. Parker as principal, and J. J. Parker, S. M. Brockway and J. C. Keepers, as sureties are held and firmly bound unto Julia A. McClain, Executrix of the Estate of Carey McClain, deceased, in the sum of $500.00 to be paid to the said Julia A. McClain, Executrix of the Estate of Carey McClain, deceased, to which payment, well and truly to be made we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18, day of June, 1913.

Whereas the above named M. V. B. Parker as plaintiff in error seeks to prosecute his writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Kansas.

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and pay all costs that may be adjudged if he shall fail to make good his plea, then this obligation to be void otherwise to remain in full force and effect.

M. V. B. PARKER.
S. M. BROCKWAY.
JOHN PARKER.
J. C. KEEPERS.

152 STATE OF KANSAS,
Johnson County, ss:

J. J. Parker, S. M. Brockway and J. C. Keepers, being each duly sworn on oath depose and say; we are each of lawful age and citizens of the State of Kansas and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of $500.00 over and above all debts, liabilities and exemptions.

JOHN J. PARKER.
S. M. BROCKWAY.
J. C. KEEPERS.

Subscribed and sworn to before me this 18th day of June, 1913.
[SEAL.] N. F. BRIGGS,
Notary Public, Johnson County, Ks.

My Commission Expires Oct. 16, 1915.

Bond approved and to operate as a bond for costs.
Dated June 24th, 1913.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

(Endorsed:) 17930. Bond. Filed June 24, 1913. D. A. Valentine, Clerk Supreme Court.

153 Supreme Court of Kansas.

No. 17930.

JULIA A. MCCLAIN, Executrix of the Estate of Carey McClain, Deceased, Plaintiff-Appellant,
vs.
M. V. B. PARKER, Defendant-Appellee.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and procedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or

some of you, being the highest court of law or equity of the State in which a decision could be had in the said suit between Julia A. McClain, Executrix of the Estate of Carey McClain, deceased, and M. V. B. Parker, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under, said state, on their ground of being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of the clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption, especially set up or claimed under such clause of the said con-
154 stitution, treaty, statute, or commission; a manifest error has happened to the great damage of the said M. V. B. Parker, defendant-appellee, as by the complaint appears.

We being willing that error, if any hath been, should by duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment is therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same, To the Supreme Court of The United States, together with this Writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the records and proceedings aforesaid be- inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White C. J. of the United States, the 24th day of June, 1913.

[Seal of District Court, U. S., District of Kansas. 1861.]

MORTON ALBAUGH,
Clerk of the District Court of the United States for the District of Kansas.

Allowed June 24th, 1913.
W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

[Endorsed:] 17930. Writ of Error. Filed Jun- 24, 1913. D. A. Valentine, Clerk Supreme Court.

155 In the Supreme Court of the State of Kansas.

No. 17930.

JULIA A. MCLAIN, Executrix of the Estate of Carey McLain, Deceased, Plaintiff-Appellant,

vs.

M. V. B. PARKER, Defendant-Appellee.

I, W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, have authorized, and do hereby authorize and deputize I. O. Pickering, of Olathe, Kansas, to serve the foregoing citation upon said Julia A. McLain, executrix of the estate of Carey McLain, deceased, or W. R. Thurmond Esq. her attorney of record.

Witness my hand this — day of June, 1913.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

[Seal Supreme Court, State of Kansas.]

Attest:
D. A. VALENTINE,
Clerk of the Supreme Court.

STATE OF KANSAS,
Johnson County, ss:

I. O. Pickering, of lawful age, being first duly sworn on oath deposes and says: He was duly authorized a and deputized by the Hon. William A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, to serve upon the defendant in error, the citation herein attached. I served the same by delivering personally to W. R. Thurmond, the attorney of record for Julia A. McLain, executrix of the estate of Carey McLain deceased, defendant in error, a true and duly attested and certified copy of said citation on him, with all indorsements thereon, at his office in Kansas City, Missouri, on the 24th day of June, 1913, at 4:15 o'clock P. M.

Witness my hand this June 25th 1913.

I. O. PICKERING.

Subscribed in my presence and sworn to before me by said I. O. Pickering this 25th day of June 1913.

[Seal of the District Court, Johnson Co., Kansas.]

S. W. ALDERSON,
Clerk of the District Court, Johnson County, Kansas.

[Endorsed:] 17930. McClain v. Parker. Commission to serve citation.

156 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Julia A. McClain, Executrix of the estate of Carey McClain, Deceased, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Kansas, wherein M. V. B. Parker is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Kansas this 24th day of June, 1913.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

[Seal Supreme Court, State of Kansas.]

Attest:

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

KANSAS CITY, MO., —— —, 1913.

I, Attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

——— ———
Att'y for Julia A. McClain, Executrix of the Estate of Carey McClain, Deceased.

[Endorsed:] 17930. Julia A. McClain v. M. V. B. Parker. Citation. Issue- June 24th, 1913. Filed Jun- 26, 1913. D. A. Valentine, Clerk Supreme Court.

157 *Certificate of Lodgment.*

STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, Clerk of the said Court, do hereby certify that there was lodged with me as such Clerk on June 24th, 1913, in the matter of Julia A. McClain, Executrix of the Estate of Carey McClain, deceased, Plaintiff-Appellant, vs. M. V. B. Parker, Defendant-Appellee;

1. The original bond of which a copy is herein set forth.
2. Four copies of the writ of error as herein set forth,—One for each defendant and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in my office, in Topeka, Kansas, this 3d day of July, A. D., 913.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of Kansas.

158 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience o the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the reords and proceedings in the within entitled case together with all hings concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Kansas in the city of Topeka this 3d day of July, A.D., 1913.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of Kansas.

Costs of Suit.

Plaintiff's coss $— paid by plaintiff.
Defendant's osts $— paid by defendant.
Costs of Transcript $— paid by defendant.

—— ——, *Clerk.*

Endorsed on cover: File No. 23,800. Kansas Supreme Court. Term No. 220. M. V. B. Parker, plaintiff in error, vs. Julia A. McClain, executrix of the estate of Carey McClain, deceased. Filed July 22d, 1913. File No. 23,800.

No. 220.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

M. V. B. PARKER, PLAINTIFF IN ERROR,

VS.

JULIA A. McLAIN, EXECUTRIX OF THE ESTATE OF CAREY McLAIN, DECEASED, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Filed, July 22, 1914.
(23,800)

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR.

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CITATIONS.

No. 220.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

M. V. B. PARKER, PLAINTIFF IN ERROR,

VS.

JULIA A. McLAIN, EXECUTRIX OF THE ESTATE OF CAREY McLAIN, DECEASED, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Filed, July 22, 1914.
(23,800)

STATEMENT.

In March, 1905, Carey McLain commenced a suit in equity against M. V. B. Parker, the plaintiff in error, in the Circuit Court of Jackson County, Missouri, alleging fraud and deceit on the part of Parker in the joint purchase and ownership by himself and McLain

of eight distinct parcels of land and mining claims situate respectively in Arkansas, Missouri and New Mexico, the transactions running over a period of more than twelve years when the suit was commenced.

The petition or bill of complaint contained eight counts, each complete within itself, and each alleging the purchase from third parties of the real property therein described, that the cost price at which the properties were purchased was misrepresented by Parker whereby he, McLain, had been induced to pay a larger price for his interest than the amount paid by Parker for a corresponding interest conveyed at the same time to Parker.

In each count McLain pleaded a tender of a deed to the defendant Parker, of all his interest and title in the land, prayed for a rescission of any and all contracts by which he and the defendant jointly held title and demanded judgment for the sums alleged to have been paid for each parcel of land with six per cent interest from date of payment respectively.

As to the seventh count in the petition the defendant accepted the proffered deeds from McLain, paid the amount demanded and this count was eliminated from the case before trial. The disposition of the seventh alleged cause of action set up in this count furnishes a complete illustration of the mutual obligations of the parties as understood by them and the same order was established by the decree as to the remaining seven counts, as, with the exception of the

amounts and descriptions of property all the counts were the same.

On April 16, 1906, a judgment and decree was rendered in said suit on the seven remaining counts by the Circuit Court of Jackson County, Missouri, for the plaintiff, McLain, and against the defendant, Parker, that any and all contracts between said parties under which they held joint ownership of said real estate, be rescinded; that the plaintiff deposit deeds to all his interest and title to said said land and mining claims with the clerk of that court which by the terms of the decree were to be delivered to the defendant, Parker, upon the payment by him of the sums awarded by said judgment to McLain upon each separate count and amounting in the aggregate to $17,840.60. In said decree the court found that McLain had so deposited said deeds with the clerk of the Circuit Court of Jackson County, Missouri.

From this decree Parker duly appealed to the Supreme Court of the State of Missouri, where the same was pending and undetermined more than four years or until June 1910, when the decree was affirmed.

On May 5, 1906, nineteen days after its rendition by the Circuit Court of Jackson County, Missouri, Carey McLain commenced an action at law against M. V. B. Parker on said decree in the District Court of Johnson County, Kansas, under Section one (1) of Article four (4) of the Constitution of the United States, and demanded judgment against Parker for the aggregate

amount of money awarded him in the Missouri court but made no tender or profert of the deeds to the real estate which he was required to deposit for the defendant as a condition precedent to his money judgment.

This second action was stayed by order of the District Court of Johnson County, Kansas, until the decision by the Supreme Court of Missouri of Parker's appeal, which, as stated, was not until June, 1910. McLain died in January, 1907, and an order was made in May, 1907, reviving said action in the name of Julia A. McLain as executrix of the estate in Kansas, who is the defendant in error here.

During the stay of said action at law in the District Court of Johnson County, Kansas, pending the appeal to the Supreme Court of Missouri aforesaid, issues were not joined, but after the mandate of the Supreme Court was reviewed, the defendant, by leave of court duly filed his answer to the petition of the plaintiff McLain, wherein he challenged the jurisdiction of the District Court of Johnson County, Kansas, on various grounds and particularly upon the ground that the action at law purported to be upon a decree in equity of another state which was not for money only (22 to 29).

Upon the trial of said action in the District Court of Johnson County, Kansas, upon the issues joined and upon the merits, judgment was rendered therein for the defendant, Parker (20). Thereafter said action was appealed by the plaintiff, Julia A. McLain, executrix, etc., to the Supreme Court of the State of Kansas.

Under the code of civil procedure of the State of Kansas, the appellee, by giving notice to the appellant, may have a review and decision of the Appellate Court upon all questions within the issues wherein he claims the trial court erred as against him. Civil Code, Kansas, 1909, Sec. 578. Due notice was given under this section and the questions specifically raised in defendant's answer involving the jurisdiction of the court and the denial of defendant's rights, privileges and immunities under the Constitution and laws of the United States, as declared in his assignments of error herein, were duly raised (26, 27), and most strenuously urged at the trial and on appeal and were refused and overruled by the Supreme Court. In its decision on appeal the Supreme Court reversed the decision and judgment of the trial court and by its mandate ordered the latter to enter judgment for the appellant, McLain, against the defendant, Parker, for the amount of the Missouri judgment. Final judgment was rendered accordingly. *McLain* v. *Parker*, 88 Kan. 717.

Thereafter the appellee, Parker, duly filed his petition for rehearing in the Supreme Court which was fully considered by the court and another opinion on such rehearing was written and the rehearing denied. *McLain* v. *Parker*, 88 Kan. 873.

A writ of error to the Supreme Court of the United States was duly allowed, due notice given and all rules and requirements of the law and this court in that behalf have been complied with and the defendant, M. V. B. Parker, as plaintiff in error, now presents the record of said case here and prays a reversal of the decision and judgment of the Supreme Court of Kansas and such orders and judgments of this court as shall be agreeable to justice and the right.

ASSIGNMENT OF ERRORS.

(For Assignment of Errors, see Record, pp. 77, 78, 79.)

Epitomized, the assignments of error by the plaintiff in error in this court, are as follows:

First. Error of the Supreme Court of Kansas, in ordering judgment against plaintiff in error on a decree in equity of another state providing mutual, dependent and, on the part of plaintiff, precedent acts as upon a judgment for money only.

Second. Error in such judgment on such cause of action without requiring the plaintiff to offer or perform obligations imposed upon him by the terms of the first decree, as a violation of the provisions of Article 14, Section 1, Constitution of the United States, thereby depriving the defendant of his property without due process of law.

Third. Error of the Supreme Court of Kansas, in, by its decision and judgment denying to defendant his rights, privileges and immunities as a citizen of the United States, by permitting the plaintiff to recover a judgment for money on a decree which required him to first offer and, on payment of the judgment for money, to deliver to defendant deeds to real estate, without such offer and without condition of any kind, contrary to Art. 14, Sec. 1, of the Constitution of the United States.

Fourth. The Supreme Court of Kansas erred in rendering judgment against the defendant upon a certified copy of what purported to be only the "judgment" and "findings" of the Missouri court, over the objections of the defendant and his plea of *nul tiel* record.

Fifth. The Supreme Court of Kansas erred in permitting the plaintiff, Julia A. McLain, as executrix of the estate of Carey McLain, deceased, in Kansas, to prosecute said action to judgment over the objection of defendant that she was not the real party in interest.

The assignment of errors in this court (77, 78, 79) are based specifically on the pleadings in the case filed in the trial court (Record, 22-29). The issues raised upon the trial and urged upon appeal to the Supreme Court involved the construction of Art. 4, Sec. 1, of the Constitution of the United States and Sec. 905, p. 37 Fed. Stats. annotated, and acts of Congress, U. S. Statutes at Large, Vol. 1, p. 122, and the jurisdiction of the Kansas courts to entertain the action at law brought in that court upon the alleged transcript of a decree in equity of the State of Missouri. *McLain* v. *Parker*, 88 Kan. 717-873 (Record, 49-53-73). The questions raised by the defendant's answer (22-29) and most strenuously urged in the Supreme Court are presented here and are contained in the record (pp. 53-71), being the petition for rehearing. The syllabus and opinion in the case of *McLain* v. *Parker*, 88 Kan. 717, on the first hearing, and the opinion on petition for rehearing id. 873, will fully inform the court that all the issues raised by the defendant in his answer were constantly urged upon the trial and on the appeal and were decided against him.

ARGUMENT AND AUTHORITIES.

(Numbers in parentheses refer to pages of the Record.)

Assignments of Error.

General Statement: The Supreme Court of the State of Kansas, erred in holding and deciding that the appellant, McLain, as executrix, in Kansas, could maintain this action at law against the defendant, Parker, in the courts of Kansas, upon a certified copy of a decree in equity by the Circuit Court of Jackson County, Missouri, in favor of her decedent, Carey McLain, and against the defendant, Parker, which decree on its face required the execution and deposit of deeds of conveyance to real estate from the plaintiff to the defendant as a condition precedent to the rendition of any money judgment for damages in favor of McLain. *A fortiori* could not such action at law be maintained in another state upon such decree without tendering performance of the same conditions precedent, viz: deposit of the same conveyances to the defendant. No such tender was made or attempted. There was neither profert or production of such deeds in this case.

(Note.) This action was commenced in Kansas, just nineteen days after the decree was rendered in Jackson County, Missouri. The case was duly appealed by Parker to the Supreme Court of Missouri, and no decision on the appeal was made until more than four

years thereafter, June, 1910. Carey McLain, the judgment creditor, died in January, 1907. The deeds had never been delivered and were therefore, worthless in the hands of the depositary in Missouri. On the death of Carey McLain before the delivery of the deeds, the title of the grantor immediately passed to his heirs and legatees.

On the trial of this case in Kansas and as well on the appeal in the Supreme Court of Kansas, McLain claimed the right to recover upon the certified record of the judgment and decree of the Circuit Court of Jackson County, Missouri, without further proof, under the provisions of section 1, article 4 of the Constitution of the United States providing that:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

In his answer to the alleged cause of action in this case the defendant plead first, *nul tiel record* (28). Second, so much of the purported record as was disclosed in the petition of plaintiff, showed on its face that neither the trial court nor the Supreme Court of Kansas had jurisdiction for the reason that plaintiff's cause of action purported to be upon the record of judicial proceedings in the state of Missouri, in a suit in equity wherein the plaintiff's decedent offered in the first instance to "do equity" by conveying to the defendant seven separate parcels of land and mining claims as a condition precedent to the money judgment which he demanded, and

the decree itself required the execution and delivery of such deeds upon the payment of the amount of the judgment by the defendant (*26, 27, 36*).

There was no showing by the plaintiff at any time by any evidence or suggestion, the value of the land required to be conveyed to the defendant by plaintiff upon the payment of the amount of the judgment. It may have been many times greater in value than the judgment. Whatever the value of the lands may have been, McLain admitted in bringing his original suit in equity in Missouri, that before he was entitled to any relief against the defendant, he must first "do equity" —that he could not retain the title to all he had received and at the same time have a decree for rescission and a judgment for damages for the full amount he had invested with interest.

In Missouri McLain offered in his bill of complaint, to surrender to the defendant all he had received under the transactions complained of, in exchange for such judgment as the court might award. The Missouri court gave him a judgment for damages but required him to perform his offer, and to convey the real estate to the defendant upon the payment of such judgment.

Having obtained this judgment and decree under the conditions stated, McLain brought this action at law in Kansas, at the home of the defendant, and demanded a judgment against the defendant for the amount of money mentioned in the Missouri judgment without offering to "do equity" in Kansas as he had in

Missouri, by conveying the lands upon payment of any judgment which he might obtain. In other words, McLain seeks in this action to obtain all the benefits of his judgment of the Missouri court, as a judgment for money only, while rejecting the burdens imposed by the same court requiring the conveyance of the lands as a condition precedent to such judgment.

A decree may be something more than a judgment for a sum certain. The very essence of equity is that it may, while requiring the one party to pay money, require, as a condition, that the other party do certain things. Bispham's Principles of Eq., page 9.

In the case of *Evans* v. *Tatem* (Pr.) 9 Sergeant & Rawle, 252, s. c. 11 Am. Dec. l. c. 721, the court said:

> "The great objection to an action in a court at law is that in general decrees in chancery are not simply for the payment of a certain sum of money, but also for something specific, which is ordered to be done by one party or the other. In such cases there will be great difficulty in supporting an action at law."

In its opinion and decision upon the petition of the appellee, M. V. B. Parker, for a rehearing, the Supreme Court of Kansas said:

> *McLain* v. *Parker*, 88 Kan. l. c. 874.
>
> "We remain of the opinion, however, that inasmuch as the judgment by its terms is payable *without condition*, the plaintiff is entitled to sue upon it in this state, where its *justice* or *injustice* is not a matter of equity" (Record, 71-72).

We submit the test of the question of jurisdiction raised by the defendant in the Kansas courts was not whether the Missouri judgment was "*payable*" without condition, but whether it was *recoverable* without condition, the object and purpose of this action being to *recover* a judgment at law upon the decree in equity rendered in Missouri.

In its first opinion in this case, *McLain* v. *Parker*, 88 Kas. l. c. 720, the Supreme Court of Kansas held and stated that the decree of the Missouri court *was* upon condition to be performed by the plaintiff. We quote as follows:

> "The Missouri judgment was based upon a petition declaring upon several distinct transactions, each pleaded as a separate cause of action * * * *As a condition to recovery* on each transaction the court required the plaintiff to execute and deposit with the clerk a deed to the property involved. The plaintiff complied with this *condition before* the judgment was rendered. He was given an absolute and unconditional (?) judgment for the recovery of a specific sum of money upon each count, but the *decree included a provision* that upon the satisfaction of each item of such judgment the corresponding deed should be delivered to the defendant" (Record, 50, 51).

Thus the Supreme Court of Kansas finds and adjudges not only that the Missouri judgment was rendered upon conditions, but that those to be performed by the plaintiff, McLain, were *precedent* conditions to be performed by him before he was entitled to any

judgment. Compliance with such conditions by McLain in the Missouri court resulted in a money judgment in his favor *in that court.*

But in the Kansas Courts McLain sues to recover upon the Missouri decree and judgment as his sole *cause of action.* He is seeking another and different judgment against the defendant in another jurisdiction. If this judgment in Missouri against the defendant for money was based upon precedent conditions to be performed by him, he must show a valid and good cause of action against the defendant in Kansas. See third and fourth paragraphs of defendant's answer (*26, 27*).

When an action is brought in one state upon a judgment and decree of a court of another state only such faith and credit as is given it by the courts of the state where rendered is required. In this case the Kansas Supreme Court goes beyond this; it relieves the plaintiff from the performance of dependent and precedent conditions; allows him to recover from the defendant a general judgment as upon a judgment for money only and deprives the defendant of his property without due process of law.

Ever since January, 1907, when McLain died, the title to the real estate which he was required to convey to the defendant has been in his heirs, legatees or other parties unknown. It will be noted McLain died more than three years before the Missouri decree was affirmed on appeal. In its first opinion, *McLain* v. *Parker*, 88 Kan. l. c. 721, the Supreme Court of Kansas, say:

> "Practical problems are suggested as likely to result from the fact that the record title remains in the plaintiff, but their solution need not be undertaken until they arise."

The same court, in its opinion denying a rehearing, say. *McLain* v. *Parker*, 88 Kan. l. c. 874:

> "We realize that the defendant is exposed to an apparent hardship by the Kansas court undertaking to enforce the foreign judgment, inasmuch as it has no power to compel the delivery of the deeds deposited with the clerk of the Missouri court for his benefit."

But this realization did not prevent the Kansas court from going beyond the Missouri court which rendered the decree and giving it potency and effect which it did not have where rendered, by relieving the plaintiff of any obligations under the decree and giving him in Kansas a judgment without conditions, which he could not have obtained in Missouri.

Having obtained his judgment in Kansas which imposes no terms or conditions, for money only, it is the Kansas judgment and not the Missouri judgment that McLain is trying to enforce. In the Kansas judgment ordered by the mandate of the Supreme Court there is no hint or intimation that the plaintiff is, or can be required to do any act except to enforce his judgment by execution.

Generally a domestic judgment is a good cause of action. If, after the rendition of the judgment and decree in the Circuit Court of Jackson County, Missouri,

McLain had sued Parker thereon as a new cause of action in Missouri where the judgment was rendered, he would have been compelled to first perform the predicate conditions on his part before he could recover the second judgment.

That only such faith and credit is due to the judicial proceedings of another state in the courts of Kansas as it would receive in the courts of the state where rendered, see:

L'Engle v. *Gates*, 74 Fed. Rep. 513.
Lang v. *Rigny*, 160 U. S. 531.
Board of Public Works v. *Columbia College*, 17 Wall. (U. S.) 521.
Danville First National Bank v. *Cunningham*, 48 Fed. Rep. 510.
Warrington v. *Ball*, 90 Fed. Rep. 464; 5 Kan. App. 423.

A suit at law in one state may be maintained upon a decree in equity of another state, provided the decree in the latter state directs the payment of a fixed and certain sum of money, absolutely and beyond peradventure. *Remington* v. *Gibson*, 16 How (U. S.) 65.

This decree, however, of the Circuit Court of Jackson County, Missouri, was not such as was contemplated in the case above cited.

The Missouri decree in this case is in the nature of one for specific performance, and not one directing the payment absolutely, of a fixed debt. For without performance by the plaintiff, consistently with the command of the court of equity, which he invoked in Mis-

court, there is no obligation resting on the defendant in that action, to perform.

It is no answer for the plaintiff to say he has performed by leaving the deeds in the custody of the court which rendered the decree, for the reason that the court in the State of Kansas, where the action at law is brought, has no power to issue process against the court rendering the decree, which process is essential to the fulfillment of the decree. If so, a judgment for the amount decreed by the first court to be due the complainant, might be enforced against the defendant without any recourse by him to obtain the deeds, on account of which the decree and resulting judgment were rendered.

We think that although the plaintiff, McLain, may have had a right to an action for specific performance, a decree thereon, is not such an order for the payment of a fixed and certain sum of money, absolutely, as will support an action at law in a sister state, consistent with Art. IV, §1 of the Constitution of the United States, and §905, p. 37, Fed. Stats. Annotated, Acts of Congress, U. S. Stats. at Large, Vol. 1, p. 122, enacted to carry out the provisions of said Art. IV, §1.

If the plaintiff, McLain, desired to lay the foundation for an action at law against the defendant in the State of Kansas, he should have obtained a judgment at law for damages for deceit; set up the agreement with the defendant, proved the contract was obtained by fraud, sold the property, the subject of the agreement, at the best price obtainable in the market, and obtained

a judgment at law for the difference between the selling price mentioned, and the price agreed upon between him and the defendant. Had he pursued this course and obtained a judgment for a fixed and certain amount of money due him from the defendant over and above the amount received from the proceeds of the property, such a decree and judgment, might have laid the foundation for an action at law in the courts of Kansas. But this was not done. The suit in Missouri, was essentially an action for rescission and cancellation of contracts and the execution and delivery of the deeds by the plaintiff to the defendant was the consideration upon which the Missouri court rendered the judgment in favor of the plaintiff. In this action the plaintiff is claiming the remedy guaranteed to him under the Federal Constitution, but denies to the defendant the equal protection of the laws to which he, under the same Constitution, is entitled.

In the case of *Warren* v. *McCarthy*, 25 Ill. 83, it is stated:

> "It is conceded that such an action (one at law in one state, predicated upon a decree in equity in another state) cannot be sustained on a *decree for the performance of acts other than the payment of money.*"

It makes no difference whether the *other acts* referred to are to be performed by the plaintiff or the defendant. As long as there remains something to be done by the complainant, and which the court at law has no power to enforce (and such a court has no extra-

territorial jurisdiction), the decree, no matter what the judgment predicated thereon, cannot be for the payment of a specific and absolute sum of money.

To maintain this action in Kansas, *debt* must lie for the recovery of the liability fixed beyond peradventure in the first action. In this case the liability of the defendant is not fixed beyond peradventure because something remains to be done by the plaintiff, viz, the delivery of the deeds, which is the equivalent of making manual delivery of the property in question. The plaintiff is attempting in this action, to enforce a decree for specific performance, rendered by the court of another state, on the ground and the only ground, upon which he can predicate his action here, that the decree is one for the payment of money only.

In the case of *Dimick* v. *Brooks*, 21 Vt. 569 (Star page of Reprint Ed.), it is said:

> "In order to sustain an action of debt upon a judgment of a sister state, the obligation must result from the *record itself* and must be shown by the *record, without requiring any averments of additional matter.*"

This authority is in line with the doctrine contained in the majority of cases on this proposition, and should be decisive of the case at bar.

In the Vermont case, last above cited, the plaintiff declared upon a judgment for $1000 (apparently for a fixed and absolute sum of money) alleging that it was recovered on the penalty of a bond, under the statutes

of New Hampshire, by which the obligor became bound in the event its terms were not fulfilled by him. The bond was given to secure the plaintiff against loss on account of the payment by him of several notes payable in installments over a period of years. Having paid the first installment due, the obligor failed to save him harmless whereupon the plaintiff recovered the penalty of the bond, being one thousand dollars and attempted to execute the judgment by suing the obligor in Vermont on an action of debt founded on such judgment.

In discussing the right of the plaintiff to bring such an action the court says:

> "It is questionable in my mind whether the courts of one state can give effect to the judgments of the courts of another state by enforcing any of the collateral remedies which the prevailing party may be entitled to have in the place where the judgment was rendered."

Following the doctrine announced in the case of *Dimick* v. *Brooks, supra,* it is plain that it is impossible for the courts of Kansas to give effect to the judgment of the courts of Missouri where something collateral to the judgment remains to be done by plaintiff in the first action. And that for the obvious reason that the courts of the State of Kansas have no possible way of commanding or compelling the Missouri Court to perform its mandates.

Hence the universal doctrine that before a decree in chancery can be the predicate of an action at law in another state, the decree must be for the payment of a fixed and certain sum of money, absolutely and without condition. And this means that the second court should have jurisdiction of the subject matter as well as of the person, where the subject matter is involved in the first decree. For while it is true that the first court may have had jurisdiction of the subject matter, its decree is of such a nature, being *in rem*, that, though a personal judgment for money followed its decree, the second court, though having jurisdiction of the person, by the very terms of the decree, did not and could not acquire jurisdiction of the subject matter without which it could not entertain the action. That is to say, the money judgment was collateral to the decree for performance by the plaintiff.

Therefore, if the Kansas court cannot command that performance, since it has no jurisdiction of the subject matter, it is without jurisdiction in the action, because it is not founded upon an absolute liability for which the action of debt will lie.

Further discussing this same proposition in the case of *Dimick* v. *Brooks*, 21 Vt. 569, *supra*, the court says:

> "It is in vain to treat this as in any sense a judgment importing an obligation, upon which to found an action for debt. It is at most an inchoate proceeding, the mere pendency of an action. It is in no sense a more perfect judgment than a de-

fault, or upon demurrer, when no damages have been assessed and when they rest *in pasis*, and *depend upon proof to be adduced in court*. In such case it would seem absurd to claim that a court in another state, or indeed any other court, could perfect the judgment.

And upon general principles and a sound analogy it seems to us that there is no good reason for allowing the action of debt *upon the record*. It is of the very essence of debt upon judgment, or upon any matter of record, that the obligation should *result from the record itself*" (that is, that the second court should not be called upon to do anything more than carry out the decree of the first court for the payment of a sum fixed and certain; that it be not called upon to command the plaintiff to do something whereby that sum alone can be determined). "The record imports absolute and complete verity. It is neither to be *increased or diminished* by any averment out of, or beyond the record. It is to the record as the law and testimony to which the pleader refers his claim. The record is formally vouched, in the conclusions of the declaration, as the basis of the claim. The defendant may crave over of the record, and have it set forth in terms as part of the pleadings, and if it do not sustain, and *fully* sustain the declaration, may demur."

The conclusions of the court in the above cause, were predicated upon the enforcement of a statute of New Hampshire, which gave rise to the judgment, by the courts of Vermont. In this case a rule of the Missouri court, sitting in equity, gave rise to the judgment which it is now sought to enforce in Kansas. As the State of Vermont would not, and perhaps could not,

enforce the New Hampshire statute, in the manner sought for by the judgment creditor, even so, the Kansas court cannot enforce the rule of the Missouri court which alone gave rise to the money judgment upon which this action in Kansas is founded. There is no difference, so far as the right to bring such actions as this are concerned, between the legislative rule or statute, and the court, rule, without either of which no judgment in either case, could have been rendered. As they are both *dehors* the record, and must be invoked to explain the judgment, the action in either case falls within the purview of the rule laid down in all jurisdictions governing actions at law brought in one state to recover upon decrees in equity of another state.

The law is well settled that when a party has been induced to enter into contracts by fraud he has two courses open to him. He can either stand on his contract and sue at law for damages on account of the fraud, or he can bring his suit in equity to rescind and cancel the contract and recover back the consideration paid. In this equitable proceeding he must offer to return everything he has received and be at all times able and willing to place the other party in *statu quo*. And this he must do as soon as the fraud is discovered. He cannot wait to speculate on the rise and fall of the value of the property received. Nor can he withdraw his offer or do any act which would prevent him from delivering title to the property which he obtained, before the decree was rendered, nor after the decree was renderd and be-

fore its terms were complied with or enforced. He must always be ready, able and willing to comply with the terms of the decree on his part and keep his offer and tender good whenever and wherever he demands his money or a compliance with the decree on the part of the other party. It will be seen that the Missouri court recognized this doctrine and did require McLain to keep his tender good and make title to any one of the properties at the same time he received back his money and interest. The deeds were required to be deposited in each count in court and under the decree these deeds conveying the title to Parker were to be delivered to him simultaneously with payment of the judgment. The Missouri court retained jurisdiction of the decree in equity to see that its provisions were enforced against both parties. If execution had been issued on the Missouri judgment, that court would have sustained a motion to quash the execution, if it had appeared that McLain had in any way lost title to any of the property he was required to convey to Parker, or if it could be shown that for any other cause McLain was unable to return to Parker the property which he had received. All of the equities remained to be adjusted in the Missouri Court where the decree was rendered. That court alone could control the *rem*. It alone could deliver the deeds and until the exchange of the deeds for the money is completed the case is still pending in that court. The Kansas court acquired, and could acquire no jurisdiction in the matter. The language of Chief Justice Marshall, quoted

in the recent case of *Hall* v. *Ames*, 190 Fed. 143, is much in point:

> "When one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize by foreign process is futile and void. The regulation of process and the decisions of questions relating to it are a part of the jurisdiction of the court which issues. The jurisdiction of a court, said Chief Justice Marshall, 'is not exhausted by the rendition of its judgment, but continues until that judgment is satisfied. Many questions arise on the process subsequent to the judgment in which the jurisdiction is to be exercised.'"

See, also, *Mound City Co.* v. *Castleman*, 187 Fed. 924, and cases cited.

Before the Kansas Court could enforce the decree of the Missouri Court it would have to reach its arms across the state line and take from the possession of the Missouri Court the deeds deposited there and hold them for Parker so as to be able to turn them over to Parker when he paid the judgment. In no other way could full faith and credit be given to the Missouri decree and its provisions enforced according to the terms of that decree. This the Kansas court was powerless to do. Its arms are too short.

Not only so, but conditions had changed when the Kansas court undertook to render judgment. McLain had died and the real estate had descended to his heirs and devisees subject to claims of creditors in Missouri,

Arkansas and New Mexico where the lands were located and under the laws of those different sovereignties. Even if the deeds could have been obtained from the Missouri court and held by the Kansas court to be delivered to Parker it is exceedingly doubtful if they would convey any title. It would depend upon a variety of circumstances.

Under the faith and credit act the Kansas court could only render the same judgment that the Missouri court rendered. No more, no less. It could not add to or take from that decree one iota of its provisions. The Missouri court rendered a conditional decree in equity. The Kansas court rendered a judgment at law on that decree without any conditions. Under the faith and credit provision this Kansas judgment could be made the basis of an unconditional judgment in any state or territory in the Union, and Parker could not be heard to say that the Kansas judgment was founded upon a Missouri decree in equity and that McLain's heirs had sold the property covered by the deeds which were to be delivered to Parker conveying to him that property as a condition for the decree. There would be no way of going behind the unconditional judgment rendered by the Kansas court.

Therefore, when the Kansas court rendered a judgment at law on the Missouri decree in equity, eliminating the conditions of the decree, it failed to give full faith and credit to the Missouri judgment in violation of the provisions of the Constitution.

Jurisdiction.

The defendant, Parker, in his answer, challenged the jurisdiction of both the Missouri court, which rendered the first judgment, and also of the Kansas court, when McLain sued upon that judgment in Kansas (24, 25, 26, 27). As to the jurisdiction of the Missouri court, the Supreme Court of Kansas, decided it had jurisdiction, because the Supreme Court of Missouri said that it had. *McLain* v. *Parker*, 88 Kan. 717. This was held to be conclusive. In this we think the court erred; the rule being that when the judgment in which the Missouri court held it has jurisdiction of the subject matter, when such jurisdiction was assailed by the defendant, is made the sole cause of action in another state, the defendant may there challenge the jurisdiction of the court which rendered the first judgment, and it is the duty of the court in the second state to determine whether the Missouri court had jurisdiction or not. It is the general rule that the question of jurisdiction can be raised at any time, and if shown that the court assuming to act was without jurisdiction, either of the person or of the subject matter, such acts are a nullity (23 Cyc. 1563). The error of which we complain in this court is, that the Supreme Court of Kansas, held that the mere fact that it was decided in the highest court of Missouri, that it had jurisdiction of the subject matter was, in itself, conclusive and binding on the courts of Kansas.

In the case of *Thompson* v. *Whitman*, 85 U. S. 457, 18 Wall. 457, this court said:

"Neither the constitutional provision that full faith and credit shall be given in each state, to the public acts, records and judicial proceedings of every other state, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered."

"The record of a judgment of another state, may be contradicted as to the facts necessary to give the court jurisdiction and if it is shown that such facts did not exist, the record will be a nullity, notwithstanding that it may recite that they did exist."

The defendant Parker, also challenged the jurisdiction of the court in Kansas. See Record (*26, 27*). The ground of this objection was that the alleged record of the decree and findings of the Circuit Court of Jackson County, Missouri, sued upon as a cause of action in the District Court of Johnson County, Kansas, showed on its face that it was not a judgment for money only, but a decree in equity directing other acts by the parties, than that of the payment of money.

No Legal Capacity to Sue.

After the death of Carey McLain in January, 1907, his widow, Julia A. McLain, claiming residence in Kansas, although then and for several years previously, residing in Missouri, was on her application appointed executrix in Kansas of the estate of Carey McLain, deceased, qualified as such and in May, 1907, procured an order of the district court of Johnson County, Kansas,

reviving the action commenced by Carey McLain against the defendant, in her name as such executrix. The deceased, Carey McLain, left a considerable estate both in Kansas and in Missouri. Before any order of revivor of said action in Kansas was made, the probate court of Jackson County, Missouri, where the decree upon which suit was brought in Kansas, was rendered and remained of record, duly appointed an administrator of the estate of Carey McLain in Missouri, who qualified and entered upon the discharge of his trust. This administrator in Missouri returned into court a sworn inventory of the estate of his decedent in Missouri, charging himself with the same. This inventory included the identical decree and judgment in the case of *Carey McLain* v. *M. V. B. Parker*, rendered by the Circuit Court of Jackson County, Missouri, and which had been used as a cause of action by McLain in the pending suit in Kansas. It was proven and conceded that administration of the estate in Missouri was open and still in course of administration when this case was tried (17).

Under these circumstances the defendant pled in his answer that the Kansas executrix had no legal capacity to maintain the action (28).

In the case of *Reynolds* v. *Quacley*, 18 Kan. 361, the court said:

> "Where the plaintiff, in an action on a note and mortgage, assigns the same to a third person,

> and afterwards dies, it is error to allow such action to be prosecuted to final judgment in the name of the administrator of said plaintiff."

The error, as pointed out by the court, in allowing the action to be prosecuted to judgment by the administrator of the plaintiff, who was the owner of the note and mortgage when the action was commenced but assigned same before judgment, was, that at his death no title to the cause of action vested in his administrator but had already passed by the assignment to his assignee, who became thereby his successor in interest.

The principle is on "all fours" with this case. Carey McLain commenced the action on a cause of action which he undoubtedly owned at the time. Before judgment he died. The devolution of the title to the cause of action passed to his representative in Missouri, immediately upon his appointment, as his successor in interest, as certainly and effectively as if McLain had made an assignment of the same in his life time. And as there was no privity between the Missouri representative and the Kansas representative, the latter, having no title to the cause of action, could not prosecute the action to judgment even "to the use of" the administrator in Missouri. *Reynolds* v. *Quacley*, 18 Kan. 361, Syl. 2. For every action must be prosecuted in the name of the real party in interest. Civ. Code, Sec. 25.

No Privity.

Where a person dies in one state owning property in the state of his residence and also in another state, and a domiciliary administrator is appointed by the probate court of the place of residence of the decedent and also an administrator is duly appointed and qualified in the other state, the title to the property in the latter state vests at once in the ancillary administrator where the property is located at the time of the decease of the owner. Particularly is this the case where the property is a specialty, as a judgment of a court of record. The relation of these two administrators while the estate remains in course of settlement, is that of strangers. There is no privity between them and one may maintain an action against the other for any property belonging to him in his representative capacity. The ancillary administrator owes no duty to the domiciliary administrator save that of accounting for any property or effects remaining in his hands after he has made final settlement of the estate.

The payment of the judguent sued on, to the Kansas executrix would be no defense to an action on the same judgment whose title to the judgment was exclusive and adverse to the domiciliary administrator.

In Woerner's Am. Law of Adm., Vol. 1 § 158, the author states:

> "* * * Nor will a judgment in favor of a foreign administrator against the debtor of his in-

testate, support an action against the debtor by an administrator in another state." * * * It follows from this doctrine that where person dying, leaves property in several jurisdictions, the legal representatives of such person must derive their authority from each of as many sovereignties as may have jurisdiction over the property so left, because the territorial element of the law, or rather of the sovereignty from which the law eminates, permits no other sovereignty to exercise authority over it, and each, therefore, must of itself, create the legal ownership necessary in its devolution.

There is no privity between administrations in different states. * * * The administration granted in the state of the domicil of the decedent, is the principal primary, original or chief administration, because the law of the domicil governs the distribution of the personal property, whether to heirs, distributees or legatees; while that granted in any other country is ancillary or auxiliary. Both are local however, to the jurisdiction in which they are granted, being limited to the chattels having a particular situs, independent of each other, save that the origin and devolution in each may be the same. It follows from this want of privity, that a judgment obtained against one, furnishes no cause of action against another, so as to affect assets under the control of the other. * * * Nor will a judgment in favor of a foreign administrator against the debtor of his intestate, support an action against the debtor by an administrator in another state."

In II Black on Judgments, 563, it is stated:

"Where letters of administration upon the same estate are granted to different persons in different states, they are so far deemed independent of each other that a judgment obtained against one,

will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; nor, if the one recovers a judgment against the debtor of the estate, can the other sue upon it as a cause of action accruing to himself; for in contemplation of law there is no privity between the principal and the ancillary administrator."

The Supreme Court of the U. S. in the case of *McLain* v. *Meek*, 18 How. 16, thus states the law:

"These administrators were independent of each other; the respective administrators represented M. the deceased intestate, by an authority coextensive only with the state where the letters of administration were granted, and had jurisdiction of the assets there, and were accountable to creditors and distributees, according to the laws of the state granting the authority, no connection existed or could exist, between them, and therefore a recovery against the one in Tennessee, was not evidence against the other in Mississippi."

Story, in his Conflict of Laws, § 522, says:

That in contemplation of law, there is no privity between persons to whom administration is graned in different states; that a judgment recovered by a foreign administrator against the debtor of his intestate, will not form the foundation of an action by an ancillary administrator in another state; but the foreign administrator must in such case maintain a personal suit against the debtor in another state.

In the case of *Low* v. *Burrows*, 12 Cal. 188, it is said:

"The second objection is equally untenable. We concede that the administrator has power over only those assets within the state where letters are granted, and we might concede that in case of notes, bonds, etc., on debtors who live and have their property beyond the jurisdiction, the administrator has no jurisdiction or dominion. But this is not the case in respect to judgment. There can be no doubt, if the debtor against whom the intestate, in his life time, obtained judgment though at the time of the death of the intestate the debtor was beyond the jurisdiction, afterwards came within the jurisdiction, the administrator might proceed to collect the money from him. The effect of a judgment as such, unlike a note, is confined to the state where rendered. It is therefore record evidence of a debt. It may be sued on, it is true, out of the state. But it is not easy to see how an administrator of the creditor in California, could take to himself as assets a judgment remaining on record in New York, merely from the fact that the debtor happened for a time being to reside in California. If the debtor went back to New York, or had property there, it is clear that the California administrator could not collect the money. If he collected anywhere it would not be by virtue of the judgment in New York vesting in him any title to it, but merely because the transcript of the judgment gave him evidence on which he might sue. The judgment is a record, and for any use to be made of it, or any power to enforce it, by execution or other process, must belong to the administrator in New York, or this anomaly would result, that the administrator in California would own the judgment for the purpose of suing on it in California and the administrator in New York would own it for the purpose of collecting it by issuing execution on it in New York. And we think no such doctrine can be maintained."

See further:

Brown v. *Fletcher's Estate*, 146 Mich. 401, S. C. 109 N. W. 686, 123 Am. St. Rep. 233.

Braithwaite v. *Harvey*, 14 Mont. 208, S. C. 43 Am. St. Rep. 625.

Ela v. *Edward*, 13 Allen (Mass.), 48 S. C. 90 Am. Dec. 174, and note pp. 175, 176, 177.

Low v. *Bartlett*, 8 Allen (Mass.), 259.

The want of privity between an ancillary administrator in Missouri and the representative of Carey McLain in Kansas, was urged by us, both in the trial court, and in the Supreme Court, and the above and other authorities cited, upon the point that the Kansas administrator had no title whatever to the Missouri judgment and that a payment to her would be no protection to the defendant. The effect of our contention appears in the language of the Supreme Court of Kansas, in its opinion denying a rehearing, *McLain* v. *Parker*, 88 Kan. 873, as follows:

> "Supplementary to the original opinion, it may be said that we do not determine that the action in Kansas on the Missouri judgment could not have been revived in the name of the Missouri administrator, nor is the decision based upon the view that technically the title to that judgment was vested in the Kansas executrix rather in the Missouri administrator. The domiciliary representative, however, has in a sense, a title to all of the property of the testator wherever situated. (18 Cyc. 1228, 1229.) The executrix cannot be regarded as a stranger to the action brought by the testator in this state upon the Missouri judgment. A payment to

> the executrix would be a complete protection to the defendant, and under the circumstances of the case, we hold that he cannot defeat the action on the ground that the revivor could only have been lawfully had in the name of the foreign administrator" (71, 72).

In making the statement above quoted that, "the domiciliary representative, however, had in a sense a title to all the property of the testator wherever situated. The executrix cannot be regarded as a stranger to the action brought by the testator in this state upon the Missouri judgment," the Supreme Court of Kansas announces a doctrine contrary to all of the authorities above cited, and to all the law defining the relations of domiciliary and ancillary administrators in different states. In this case the executrix in Kansas, had absolutely no title or right in the judgment of her decedent against the defendant in Missouri which was the sole cause of action in the action in Kansas. The administrator in Missouri alone had title to that judgment and there was no privity between him and the executrix in Kansas, and she was, as to that judgment, absolutely a stranger, and had no right to maintain a suit upon it against the defendant in the Kansas court.

The authority cited by the Supreme Court of Kansas to support the proposition above quoted that "a payment to the executrix would be a complete protection to the defendant," sustains the contention of the defendant that such payment would be no protection to him, nor any defense to an action brought against him upon the

judgment by the administrator appointed in Missouri, where the judgment remained of record. The law as stated in 18 Cyc. 1228, 1229, is as follows:

> "It is the duty of an ancillary representative to collect all the assets of the estate within the jurisdiction of his appointment and his right to do so is superior to that of a foreign domiciliary representative, even though in that jurisdiction a foreign representative is authorized by statute to sue, for even where such statute exists, it remains the universal policy to preserve the local assets for the satisfaction, in the first instance of local claims. A voluntary payment to the domiciliary representative, will not bar a suit brought by the ancillary representative to recover the same debt, unless such payment was made prior to the appointment of the ancillary representative."

According to all the authorities, including 18 Cyc. *supra*, there is no sense in which the domiciliary executrix, has any ownership or title in a judgment of another state obtained by her decedent against the defendant, when there is an ancillary administrator of the estate duly appointed, qualified and acting, as there was in this case, who had, in the course of his administration actually reduced to his possession the same judgment sued upon by the domiciliary executrix. In such a case there is no exception to the rule that the domiciliary executrix has no title to the foreign judgment, and the judgment debtor is not protected.

It follows, that having no title to the cause of action the domiciliary executrix in this case has no right to maintain an action upon it against the defendant.

We think the uncontradicted facts in this case and the law applicable thereto warrants the reversal of the decision and judgment of the Supreme Court of Kansas by this court and for such judgment of reversal the plaintiff in error earnestly prays.

EDWARD P. GARNETT,
ISAAC O. PICKERING,
Solicitors and of Counsel for Plaintiff in Error.

No. 220.

In the

Supreme Court of the United States

October Term, 1914.

M. V. B. PARKER, *Plaintiff in Error*,

vs.

JULIA A. McLAIN, Executrix of the Estate of Carey McLain, Deceased, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

W. R. THURMOND,
For Defendant in Error.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

Carey McLain obtained a judgment in the State Circuit Court of Jackson County, Missouri, on April 16, 1906, against M. V. B. Parker, on a cause of action based upon allegations of fraud and deceit, to the effect that Parker induced McLain to expend certain sums of money on the pretense that McLain and Parker were purchasing property jointly; whereas, in fact, Parker was misrepresenting the cost of the property and was pocketing the difference

between what the property cost and what McLain turned over to Parker to pay for the property. (34-47.)

The suit was for money and the judgment rendered was for money and nothing else. As an incident to the suit McLain tendered to Parker by deed or by the offer of certificates of stock in corporations the share of the things which McLain had gotten from third parties in the transactions into which Parker had so fraudulently induced him to enter. On Parker's refusal to receive the deeds or the stock McLain kept his tender good by bringing the deeds and stock certificates into court and depositing them with the clerk of the court. The court in its judgment entry provided that whenever Parker satisfied the judgment he could take the deeds and stock certificates which had been tendered into court for him. Parker never paid the judgment and he never accepted the deeds or the stock which were tendered to him, except in one instance, where, before the trial of the case, he did accept plaintiff's tender, paid into court the money sued for in the seventh count of the petition, and took down the deed tendered in that count.

A very clear understanding of the Missouri case may be had by reading the case of *McLain* v. *Parker*, 229 Mo. 68.

The Missouri Code provides (R. S. Mo. 1909, Sec. 1727):

> "There shall be in this state but one form of action for the enforcement or protection of private rights, and redress or prevention of private wrongs, which shall be denominated a civil action."

It is not material whether the Missouri action was one at law or in equity.

The defendant in the Missouri case urged that the remedy of the plaintiff in that case was one at law and not in equity.

The Supreme Court of Missouri say, page 87:

> "* * * plaintiff, while charging fraud and deceit in the petition, and having the right to sue for damages without rescinding the contract, has taken the precaution in this, as in other counts, to make a tender of such instruments as would place the defendant in *statu quo.*"

and at page 93:

> "* * * The gist of these several counts is fraud and deceit, and money paid out to defendant in consequence thereof, and the prayer of the petition is to recover the money so obtained, with interest thereon. The judgment responds to the petition, its prayer and the proof. *It is immaterial how we classify the action.*"

In the Missouri case Parker appealed from the judgment of the Circuit Court to the Supreme Court of Missouri, without giving any supersedeas bond, and the plaintiff in the Missouri case, being unable then to find property upon which to levy in Missouri, brought suit on his judgment in the District Court of Johnson County, Kansas. That court stayed the proceedings, pending the decision by the Missouri Supreme Court, and in the meantime Carey McLain died, being at the time of his death a resi-

dent of Kansas, leaving a will (15) whereby—aside from certain comparatively small legacies—he bequeathed all of his property, which included the judgment in question, to his widow, named her the executrix of his will, and she was duly appointed by the Probate Court of Johnson County, Kansas, and qualified as such executrix.

Upon the suggestion of the death of Carey McLain, to the Kansas District Court, the suit was, with consent of defendant, revived in the name of the executrix. (The suit was brought in Kansas by Carey McLain himself, so that it is not a case of who was entitled to sue on the Missouri judgment, administrator or executrix, but the question was, in whose name the cause of action could be revived.)

The District Court of Johnson County, Kansas, upon the trial of the suit based on the Missouri judgment, found for the plaintiff in that case upon all points except on the question of whether the executrix was entitled to maintain the action, and on this point and on this point alone, rendered judgment for the defendant Parker for costs.

The case was appealed to the Kansas Supreme Court and by that court reversed with directions to the District Court to enter judgment in favor of the plaintiff, the executrix.

McLain v. *Parker*, 88 Kan. 717.

The defendant in the Kansas case (plaintiff in error here) raises no Federal question by his answer (22) nor does he at any time in the trial of this case attempt to raise or inject any Federal question into the case. There is no Federal question in the

case when it is decided by the Supreme Court of Kansas and none mentioned in the opinion of that court. It is only by motion for rehearing in the Supreme Court of Kansas that the defendant there (plaintiff in error here) attempts to inject any Federal question into the case. And his attempt so to do on his motion for a rehearing is so frivolous that the Supreme Court of Kansas does not notice it in any shape or form—does not pass on it.

McLain v. *Parker*, 88 Kan. 873.

POINTS AND AUTHORITIES.

I.

There is no Federal question involved in this appeal.

Chas. W. Lynde v. *Mary W. Lynde,* 181 U. S. 183.

II.

The Supreme Court of Kansas, having decided in favor of the full faith and credit claimed for the Missouri judgment under the Constitution and Laws of the United States, its judgment cannot be reviewed by this court on writ of error.

Chas. W. Lynde v. *Mary W. Lynde,* 181 U. S. 183.

III.

The Federal question attempted to be raised comes too late, being presented for the first time on motion for rehearing in the State Supreme Court.

Capitol Nat'l Bank of Lincoln, Nebr. v. *First National Bank of Cadiz, Ohio,* 172 U. S. 426.

William McCorquodale v. *State of Texas,* 211 U. S. 432.

Kansas City Star Company v. *Henry S. Julian,* 215 U. S. 589.

IV.

"In every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount, and nothing more."

Pennington v. *Gibson*, 16 Howard 65.

V.

All other points made by the plaintiff in error relate to questions arising under the laws of the States of Missouri and Kansas, and are decided (and manifestly correctly decided) by the highest courts of those states (229 Mo. 68; 88 Kan. 717, 873), whose decisions on such points are not subject to review by this court.

State of Missouri v. *Hill*, 191 U. S. 165, 63 L. R. A. 572, Note.

Respectfully submitted,

W. R. THURMOND,
Solicitor for Defendant in Error.

PARKER v. McLAIN, EXECUTRIX OF McLAIN.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 220. Submitted April 14, 1915.—Decided May 10, 1915.

In order to give this court jurisdiction to review the judgment of a state court under § 237, Judicial Code, the assertion of a Federal right must not be frivolous or wholly without foundation; otherwise an utterly baseless Federal right might be made the basis for invoking the jurisdiction of this court merely for purposes of delay.

Whether a consent by a defendant to a revivor amounts to an estoppel against challenging the capacity of the substituted plaintiff to continue the action is purely a question of local law or practice and the decision of the state court is controlling.

Nothing in the full faith and credit clause of the Federal Constitution or in the statute enacted thereunder requires the authenticated proof of a decree to include all the pleadings and proceedings.

Where the original decree entered in one State and sued on in another does not purport to lay a reciprocal duty on the judgment creditor, but simply recites that on performance the judgment debtor becomes entitled to papers in the registry of the court, full faith and credit is not denied because the judgment entered on the decree in the latter State does not impose an actual reciprocal duty on the judgment creditor.

In this case the Federal questions raised being so plainly devoid of merit as to be frivolous the writ of error is dismissed.

Writ of error to review 88 Kansas, 717 and 873, dismissed.

THE facts, which involve the application of the full faith and credit clause of the Federal Constitution and the jurisdiction of this court under § 237, Judicial Code, are stated in the opinion.

Mr. Edward P. Garnett and *Mr. Isaac O. Pickering* for plaintiff in error.

Mr. W. R. Thurmond for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

In a suit in the Circuit Court of Jackson County, Missouri, wherein the court had jurisdiction of the parties and the subject-matter, Carey McLain secured a decree against M. V. B. Parker for a considerable sum of money. The suit was brought and the decree rendered upon the theory that Parker had fraudulently induced McLain to join him in the purchase of certain property; that by falsely overstating the value of the property, the price at which it was being purchased and the amount he was contributing to the price, Parker had secured from McLain several sums as the latter's share of the purchase money when in truth these sums greatly exceeded his share, and that in consequence McLain was entitled to surrender his interest in the property to Parker and call upon him to refund what was paid to him. Before beginning the suit McLain executed and tendered to Parker appropriate deeds for the property, and when the suit was begun the deeds were brought into court and lodged with the clerk to be disposed of by the decree when rendered. Following a recital of these matters and a finding that McLain had been damaged to the extent of his payments to Parker, the decree ordered that the former have and recover from the latter the amounts paid—each being definitely stated—with interest at six per cent. per annum from the date of the decree, and directed that upon the satisfaction of the decree the deeds lodged with the clerk be delivered by him to Parker. The latter carried the case to the Supreme Court of Missouri, which affirmed the decree and in doing so pointed out the nature of the suit in these words, 229 Missouri, 68, 87, 93: "Plaintiff whilst charging fraud and deceit in the petition, and having the right to sue for damages without rescinding the contract, has taken the precaution in this, as in other counts, to

make a tender of such instruments as would place the defendant *in statu quo*. . . . The gist of these several counts is fraud and deceit, and money paid out to defendant in consequence thereof, and the prayer of the petition is to recover the money so obtained, with interest thereon. The judgment responds to the petition, its prayer and the proof."

After securing that decree McLain brought an action thereon in the District Court of Johnson County, Kansas, and during the pendency of the action died leaving a will. The will was duly probated in Kansas, the State of his residence, and letters testamentary were issued in that State whereby his widow became his executrix. An ancillary administrator was also appointed by the Probate Court of Jackson County, Missouri. Thereafter the action in Kansas was revived in the name of the executrix, with the defendant's express consent, and in regular course a trial was had at which all questions of fact and law were resolved in the plaintiff's favor, save that it was held that the real party in interest was not the executrix but the Missouri administrator and that the action ought not to have been revived in the name of the executrix. Judgment was rendered for the defendant and upon appeal to the Supreme Court of Kansas was reversed with a direction to enter judgment for the plaintiff. 88 Kansas, 717, 873. The present writ of error was then sued out by the defendant.

Our jurisdiction to review the judgment of the highest court of a State turns upon whether a Federal right was specially set up or claimed in that court and denied by its decision. Judicial Code, § 237. And to be effective for this purpose the assertion of a Federal right must not be frivolous or wholly without foundation. It must at least have fair color of support, for otherwise an utterly baseless Federal right might be set up or claimed in almost any case, and the jurisdiction of this court invoked merely

for purposes of delay. *Hamblin* v. *Western Land Co.*, 147 U. S. 531; *Wilson* v. *North Carolina*, 169 U. S. 586, 595; *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336, 344; *Sawyer* v. *Piper*, 189 U. S. 154, 156.

The contentions advanced by the defendant in the Supreme Court of Kansas upon which the jurisdiction of this court is sought to be rested are (a) that under the law of Missouri where the decree sued on was rendered the administrator appointed in that State was the real party in interest and therefore the executrix was without legal capacity to maintain the action; (b) that the decree was not proved conformably to the law of Congress (Rev. Stat., § 905), because, as was objected when the proof was offered, the authenticated record produced in evidence did not contain all the pleadings and proceedings in the suit but only the decree with its recitals and findings; and (c) that by the terms of the decree the payment of the money by the defendant and the execution and delivery of the deeds by McLain were intended to be reciprocal, interdependent and concurrent acts and that to make the decree the basis of a judgment in Kansas against the defendant for the payment of the money without requiring performance of the reciprocal obligation imposed upon McLain would contravene the full faith and credit clause of the Federal Constitution (Art. IV, § 1) and the law enacted thereunder by Congress (Rev. Stat., § 905), and would deprive the defendant of the due process of law and the equal protection of the laws secured by the Fourteenth Amendment.

The first contention was overruled because, as was said in the opinion, "the defendant explicitly consented to the revivor in the name of the executrix and in view of that fact cannot be heard to question her capacity to maintain the action." Whether by consenting to the revivor and thus recognizing the executrix as the real party in interest (see Gen. Stat. Kan. 1909, § 6023) the defendant

was estopped from subsequently challenging her capacity to maintain the action was purely a question of local law or practice, and its decision by the Supreme Court of the State is controlling.

The next contention was wholly without any support and was so held by the Supreme Court of the State. There is nothing in the full faith and credit clause of the Constitution or in the statute enacted thereunder which requires that the authenticated proof of a decree shall include all the pleadings and proceedings in the suit, or which attempts to specify what parts of the proceedings in a state court shall be included in making up the record in an adjudicated cause. While there may be instances in which a decree or judgment could not well be understood, or would not clearly show what was determined, unless read in connection with the pleadings or other proceedings, this was not such an instance. The recitals and findings were so full and explicit and the terms of the decree so direct that nothing more was required to disclose its full purpose or what was determined by it.

The remaining contention was equally without color, because it rested upon an obviously false assumption. The decree did not purport to lay any reciprocal duty or obligation upon McLain but, on the contrary, proceeded upon the theory that he had done all that could be required of him. This was recognized by the Supreme Court of Kansas, which said in its opinion (pp. 720, 721): "He was given an absolute and unconditional judgment for the recovery of a specific sum of money. . . . Its enforcement was not made to depend upon any act to be subsequently performed. When it was paid or satisfied the defendant was entitled to receive the deeds from the clerk." And again, p. 874, "If collection is made here it must be presumed that the defendant, upon showing that fact to the Missouri court, can obtain his deeds, just as he might do if the judgment had been satisfied in any

other manner, and just as he might procure a discharge of any judgment against him, the amount of which had been collected by suit thereon in another State."

What has been said sufficiently discloses that the Federal questions raised in the case were so plainly devoid of merit as to afford no basis for a review in this court.

Writ of error dismissed.